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The Supreme Court Takes a Weapon from the Drug War Arsenal: New Defenses to Civil Drug Forfeiture.

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COMMENTS

THE SUPREME COURT TAKES A WEAPON FROM THE DRUG WAR ARSENAL: NEW DEFENSES TO CIVIL DRUG FORFEITURE

SCOTT ALEXANDER NELSON

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I. INTRODUCTION

The United States government has a powerful new tool in the war on drugs—civil asset forfeiture.¹ Although forfeiture is a medieval doctrine,

1. See 21 U.S.C. § 881 (1988) (authorizing forfeiture of property used in violation of drug laws); see also Damon G. Saltzburg, Note, *Real Property Forfeitures as a Weapon in the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. REV. 217, 217 (1992) (announcing that civil forfeiture is powerful weapon in drug war); Jack Yoskowitz, Comment, *The War on the Poor: Civil Forfeiture of Public Housing*, 25

it remained dormant in the fight against crime until recently.² However, in response to the "growing menace of drug abuse in the United States,"³ influential politicians have escalated their talk to action against suppliers and users of illegal drugs.⁴ As a result, Congress enacted civil forfeiture laws that authorize the government to seize assets, including real and personal property,⁵ without necessarily seeking any criminal prosecution

COLUM. J.L. & SOC. PROBS. 567, 567 (1992) (suggesting that civil forfeiture is important tool for government).

2. See J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 510 (1921) (analyzing forfeiture and ancient law of deodands, under which personal chattel that caused injury was forfeited). Forfeitures have been used for thousands of years. See Michael McCarthy, Comment, *Rendering Illegal Behavior Unprofitable: Vehicle Forfeiture Under the Uniform Controlled Substances Act*, 8 CREIGHTON L. REV. 471, 472-76 (1974) (detailing historical development of forfeiture); see also Christine Meyer, Comment, *Zero Tolerance for Forfeiture: A Call for Reform of Civil Forfeiture Law*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 853, 856 (1991) (recognizing that civil forfeiture is founded on medieval doctrine); William P. Nelson, Comment, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance With Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309, 1309 (1992) (stressing that asset forfeiture was once disfavored in American law). In 1875, the United States Supreme Court noted that "[f]orfeitures are not favored in the law. Courts always incline against them. When either of two constructions can be given to a statute, and one of them involves a forfeiture, the other is to be preferred." *Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 35 (1875). See generally Damon G. Saltzburg, Note, *Real Property Forfeitures as a Weapon in the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. REV. 217, 220 (1992) (recognizing that early forfeiture law in United States was generally confined to admiralty law); Michael Schecter, Note, *Fear and Loathing and the Forfeiture Laws*, 75 CORNELL L. REV. 1151, 1154 (1990) (indicating that source of modern forfeiture law was 17th-century maritime expansion in England); David J. Stone, Note, *The Opportunity of Austin v. United States: Toward a Functional Approach to Civil Forfeiture and the Eighth Amendment*, 73 B.U. L. REV. 427, 430-31 (1993) (tracing extensive history of forfeiture in common law).

3. H.R. REP. NO. 1444, 91st Cong., 2d Sess. 1 (1970), reprinted in 1970 U.S.C.C.A.N. 4566-67.

4. See James B. Speta, Note, *Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment*, 89 MICH. L. REV. 165, 165 (1990) (noting that intensification of drug war resulted from rhetoric of leading politicians). See generally Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1390-91 (1993) (stating that former President Ronald Reagan's "unshakable" commitment to win drug war eroded civil liberties); Eric G. Zajac, *Tenancies by the Entirety and Federal Civil Forfeiture Under the Crime Abuse Prevention and Control Act: A Clash of Titans*, 54 U. PITT. L. REV. 553, 554 (1993) (asserting that drug war initiated by President Reagan has involved all levels of government, including military); Mark A. Jankowski, Note, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165, 169 (1990) (asserting that Congress, tired of losing drug war, has escalated rhetoric to action against drug dealers).

5. See Damon G. Saltzburg, Note, *Real Property Forfeitures as a Weapon in the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. REV.

against the owner of the property.⁶ The potential for government abuse is furthered by a statutory forfeiture scheme that allows local law enforcement agencies to augment their budgets by collecting part of the proceeds received from successful asset forfeiture.⁷

The federal statute authorizing civil forfeiture is 21 U.S.C. § 881 (the Forfeiture Statute).⁸ Initially enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970,⁹ the original version of the Forfeiture Statute proved largely unsuccessful because forfeiture was limited to persons convicted of participating in continuing criminal enterprises.¹⁰ The Comprehensive Forfeiture Act of 1984 significantly amended the statute to impose forfeiture on any real property purchased,

217, 217 (1992) (noting extensive escalation of civil forfeiture); *see also* David J. Stone, Note, *The Opportunity of Austin v. United States: Toward a Functional Approach to Civil Forfeiture and the Eighth Amendment*, 73 B.U. L. REV. 427, 428 (1993) (showing broad scope of civil forfeiture statute); Jack Yoskowitz, Comment, *The War on the Poor: Civil Forfeiture of Public Housing*, 25 COLUM. J.L. & SOC. PROBS. 567, 567 (1992) (noting that when government believes house to be site of drug activity, it institutes civil forfeiture action to divest owner's interest in property). *See generally* William F. Buckley, Jr., *The Futile War on Drugs May Be Destroying Rather Than Saving Our Society*, HOUS. CHRON., Mar. 16, 1993, at A13 (recognizing that government seizes \$1.6 billion in property each year).

6. *See* Eric G. Zajac, *Tenancies by the Entirety and Federal Civil Forfeiture Under the Crime Abuse Prevention and Control Act: A Clash of Titans*, 54 U. PITT. L. REV. 553, 560 (1993) (illustrating that because focus is between alleged crime and property, criminal conviction is not necessary for forfeiture); Christine Meyer, Comment, *Zero Tolerance for Forfeiture: A Call for Reform of Civil Forfeiture Law*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 853, 859 (1991) (stating that constitutional safeguards in civil forfeiture are limited compared to protections in criminal forfeiture); William P. Nelson, Comment, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309, 1317-22 (1992) (noting that government has enormous prosecutorial advantage over claimants in civil forfeiture action); James B. Speta, Note, *Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment*, 89 MICH. L. REV. 165, 166 (1990) (explaining that criminal conviction is not required for civil forfeiture action).

7. *See* William P. Nelson, Comment, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309, 1311 (1992) (recognizing that law enforcement agencies directly augment budgets through civil forfeiture); *see also* Christine Meyer, Comment, *Zero Tolerance for Forfeiture: A Call for Reform of Civil Forfeiture Law*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 853, 883 (1991) (suggesting that increasing agency budgets through civil forfeiture leads to less time spent investigating violent crimes).

8. 21 U.S.C. § 881 (1988).

9. Act of Oct. 27, 1970, tit. II, § 511, 84 Stat. 1236, 1276-78 (1970) (codified as amended at 21 U.S.C. §§ 801-979 (1988)).

10. *See* Sean D. Smith, Comment, *The Scope of Real Property Forfeiture for Drug-Related Crimes Under the Comprehensive Forfeiture Act*, 137 U. PA. L. REV. 303, 303 (1988) (noting limited success of original statute in counteracting drug dealers' activities); *see also* Mark A. Jankowski, Note, *Tempering the Relation-Back Doctrine: A More Reason-*

used, or intended to be used to facilitate narcotics trafficking.¹¹ This amendment greatly expanded the potency and scope of civil forfeiture by authorizing in rem actions, which provide few of the constitutional guarantees that are attached to a criminal indictment.¹² For these reasons, the war on drugs must be fought with care to ensure that constitutional rights are not violated.¹³

Recognizing the potential for abuse, the United States Supreme Court recently announced a trio of cases protecting important constitutional liberties.¹⁴ These decisions provide important Fifth and Eighth Amendment defenses against overzealous efforts by law enforcement personnel pursuing civil forfeiture.¹⁵ This Comment discusses the history and development of forfeiture law, emphasizing the misnomer of "guilty property."

able Approach to Civil Forfeiture in Drug Cases, 76 VA. L. REV. 165, 168 (1990) (stating that original civil forfeiture statute was unsuccessful in achieving its goals).

11. See Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, § 306, 98 Stat. 1837, 2050 (codified as amended at 21 U.S.C. § 881 (a)(7) (1988)) (providing for forfeiture of real property); see also Mark A. Jankowski, Note, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165, 170 (1990) (showing that Comprehensive Forfeiture Act of 1984 amended Forfeiture Statute to allow real property forfeiture); William P. Nelson, Comment, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309, 1316 (1992) (asserting that 1984 amendment to Forfeiture Statute allowing real property forfeiture has been broadly construed by courts); Damon G. Saltzburg, Note, *Real Property Forfeitures as a Weapon in the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. REV. 217, 218 (1992) (finding dramatic increase in use of civil forfeiture since 1984 amendment authorized forfeiture of real property).

12. See Damon G. Saltzburg, Note, *Real Property Forfeitures as a Weapon in the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. REV., 217, 218 (1992) (noting that 1984 amendment to Forfeiture Statute specifically provided for forfeiture of real property).

13. See Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1434 (1993) (noting enormous advantage civil forfeiture gives prosecution because defendants in drug-related cases cannot afford to hire lawyers).

14. See *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 495 (1993) (interpreting Fifth Amendment's Due Process Clause to require government to give notice before seizure of real property by civil forfeiture); *Austin v. United States*, 113 S. Ct. 2801, 2812 (1993) (asserting that Excessive Fines Clause of Eighth Amendment applies to in rem civil forfeiture proceedings); *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126, 1134 (1993) (recognizing that "innocent owner" defense in § 881 is not limited to bona fide purchases).

15. See Christine Meyer, Comment, *Zero Tolerance for Forfeiture: A Call for Reform of Civil Forfeiture Law*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 853, 864 (1991) (noting that numerous constitutional violations are found in civil forfeiture); James B. Speta, Note, *Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment*, 89 MICH. L. REV. 165, 166 (1990) (suggesting that civil forfeiture statute needs to be tempered by traditional constitutional protections because of potential for abuse).

Additionally, this Comment addresses the lack of constitutional safeguards in the civil forfeiture statutes and outlines the prospective constitutional defenses recently announced by the Court, with emphasis on the Fifth Amendment guarantee of due process, the Eighth Amendment's Excessive Fines Clause, and the "innocent owner" defense.

II. HISTORY AND THEORY OF FORFEITURE LAW

A. *Origins of Forfeiture*

The idea of forfeiture has an extensive history in the law.¹⁶ Many historians trace the concept back to the biblical laws of Exodus: "If an ox gore a man or woman, and they die, he shall be stoned: and his flesh shall not be eaten, but the owner of the ox shall be quit."¹⁷ Early English common law adopted some of these biblical practices, requiring property forfeiture under certain circumstances.¹⁸ For example, if a chattel directly or indirectly caused the accidental death of a king's subject, the law required forfeiture of the chattel to the Crown.¹⁹ Courts justified this

16. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 (1974) (recognizing that forfeiture originated from pre-Judeo-Christian and biblical practices); *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 234 (1844) (discussing history of forfeiture in context of admiralty law); see also Christine Meyer, Comment, *Zero Tolerance for Forfeiture: A Call for Reform of Civil Forfeiture Law*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 853, 865 (1991) (asserting that biblical practices influenced English adoption of forfeiture doctrine); Damon G. Saltzburg, Note, *Real Property Forfeitures as a Weapon in the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. REV. 217, 220 (1992) (showing widespread use of forfeiture in English common law). See generally Eric G. Zajac, *Tenancies by the Entirety and Federal Civil Forfeiture Under the Crime Abuse Prevention and Control Act: A Clash of Titans*, 54 U. PITT. L. REV. 553, 555 (1993) (recognizing that modern forfeiture statutes originated in Anglo-Saxon tradition).

17. *Exodus* 21:28; see *Pearson Yacht*, 416 U.S. at 681 n.17 (quoting *Exodus* 21:28 in tracing historical beginnings of forfeiture).

18. See *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827) (concluding that early English forfeiture of chattels to Crown required conviction of offenders); see also *United States v. Grande*, 620 F.2d 1026, 1038 (4th Cir.) (noting English forfeiture was not irrational because property and land was held through Crown), *cert. denied*, 449 U.S. 830 (1980). See generally William P. Nelson, Comment, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309, 1313 (1992) (recognizing that current forfeiture statutes bear marks of ancestors); Damon G. Saltzburg, Note, *Real Property Forfeitures as a Weapon in the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. REV. 217, 220 (1992) (indicating that although English common law made widespread use of forfeiture, early American forfeiture law was limited to admiralty law); Jack Yoskowitz, Comment, *The War on the Poor: Civil Forfeiture of Public Housing*, 25 COLUM. J.L. & SOC. PROBS. 567, 572 (1992) (arguing that forfeiture is antiquated legal fiction).

19. See *Austin v. United States*, 113 S. Ct. 2801, 2806-07 (1993) (elaborating on types of forfeiture established in England); *Pearson Yacht*, 416 U.S. at 680-81 (recognizing that

forfeiture, known as deodand,²⁰ by reasoning that "the instrument of death was accursed and that religious expiation was required."²¹

inanimate object was forfeited to Crown as deodand if it accidentally killed king's subject). In addition to common law, English statutes provided instruments for forfeiture. See Eric G. Zajac, *Tenancies by the Entirety and Federal Civil Forfeiture Under the Crime Abuse Prevention and Control Act: A Clash of Titans*, 54 U. PITT. L. REV. 553, 556 (1993) (asserting that common-law forfeiture differed from statutory forfeiture because latter was against thing itself). These statutes provided that objects used to violate revenue and customs laws were surrendered to the Crown. *Id.* Forfeiture by statute was considered in rem, or against the thing itself, while common-law forfeiture was in personam, or against the person. *Id.* See generally Christine Meyer, Comment, *Zero Tolerance for Forfeiture: A Call for Reform of Civil Forfeiture Law*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 853, 865 (1991) (recognizing that common-law forfeiture was premised on guilt of property, not guilt of person).

20. A deodand is defined as "any personal chattel which was the immediate occasion of the death of any reasonable creature, and which was forfeited to the crown." BLACK'S LAW DICTIONARY 436 (6th ed. 1990). "Deodand derives from the Latin *Deo dandum*, 'to be given to God.'" See *Pearson Yacht*, 416 U.S. at 681 & n.16 (illustrating justification of deodand as penalty for carelessness after application of deodand to religious purposes ceased). However, the concept of deodand is not unique to jurisdictions following the common law. See Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169, 181-82 (1973) (explaining that equivalents to deodand existed in Anglo-Saxon law and African tribal law). The English use of deodand was abolished in 1846. See Jack Yoskowitz, Comment, *The War on the Poor: Civil Forfeiture of Public Housing*, 25 COLUM. J.L. & SOC. PROBS. 567, 572-73 (1992) (determining that English Parliament annulled deodands because concept was irrational). Lord Campbell, the first to propose abolition of deodands, stated: "The wonder was that a law so extremely absurd and inconvenient should have remained in force down to the middle of the 19th century . . ." 77 HANSARD, PARLIAMENTARY DEBATES 1027 (1845), quoted in Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L. REV. 169, 171 (1973).

21. *Pearson Yacht*, 416 U.S. at 681; see *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 511 (1921) (declaring that forfeiture is firmly fixed in remedial jurisprudence of United States). The personal chattel that caused the death of a reasonable creature was to be put to pious uses and eventually distributed in alms. 1 WILLIAM BLACKSTONE, COMMENTARIES *300. Ostensibly, the deodand doctrine was originally created to expiate the souls of those taken away by sudden death. *Id.*; see also O.W. HOLMES, JR., THE COMMON LAW 2 (1881) (emphasizing that early legal procedure rooted in vengeance); David J. Stone, Note, *The Opportunity of Austin v. United States: Toward a Functional Approach to Civil Forfeiture and the Eighth Amendment*, 73 B.U. L. REV. 427, 431 (1993) (concluding that requirement of religious expiation necessitated proceeding to be brought against property, not owner). But see Eric G. Zajac, *Tenancies by the Entirety and Federal Civil Forfeiture Under the Crime Abuse Prevention and Control Act: A Clash of Titans*, 54 U. PITT. L. REV. 553, 555 (1993) (suggesting that deodand was eventually justified as carelessness penalty).

The English practice of deodand never became a legal custom in the United States.²² However, the American colonies adopted the concept behind deodands—*forfeiture*.²³ In *C.J. Hendry Co. v. Moore*,²⁴ the United States Supreme Court recognized that “[l]ong before the adoption of the Constitution the common law courts in the colonies—and later in the states during the period of confederation—were exercising jurisdiction *in rem* in the enforcement of forfeiture statutes.”²⁵ The legislation

22. See *Parker-Harris Co. v. Tate*, 188 S.W. 54, 55 (Tenn. 1916) (depicting base of deodand doctrine as “superstition”). As the Tennessee Supreme Court noted: “To the credit of American jurisprudence, from the outset the doctrine was deemed to be so repugnant to our ideas of justice as not to be included as a part of the common law of this country.” *Id.*; see also *Pearson Yacht*, 416 U.S. at 682 (stressing that deodand is not part of American common-law tradition). In fact, the American legal system was so opposed to deodands that the tradition of real property forfeiture as a consequence of a federal criminal conviction was statutorily prohibited from 1790 until the 1984 amendments to the narcotics laws. See Eric G. Zajac, *Tenancies by the Entirety and Federal Civil Forfeiture Under the Crime Abuse Prevention and Control Act: A Clash of Titans*, 54 U. PITT. L. REV. 553, 556 (1993) (noting several states passed acts of attainders requiring forfeiture of felon’s property); see also Jack Yoskowitz, Comment, *The War on the Poor: Civil Forfeiture of Public Housing*, 25 COLUM. J.L. & SOC. PROBS. 567, 573 (1992) (stressing that although deodands were not adopted in United States, *in rem* proceedings were used for forfeiture of vessels violating customs laws). See generally O.W. HOLMES, JR., *THE COMMON LAW* 28 (1881) (illustrating that at common law, liability could not be placed on chattel without liability imposed on owner).

23. See *Pearson Yacht*, 416 U.S. at 683 (asserting that forfeiture statutes apply to almost any property used in criminal enterprise); *The Palmyra*, 25 U.S. at 15 (indicating that *in rem* proceeding jurisdiction is not vested in courts which exercise criminal jurisdiction); see also *Boyd v. United States*, 116 U.S. 616, 622 (1886) (recognizing that neither England nor United States authorized seizure of person’s private papers in forfeiture actions until 1863); Eric G. Zajac, *Tenancies by the Entirety and Federal Civil Forfeiture Under the Civil Abuse Prevention and Control Act: A Clash of Titans*, 54 U. PITT. L. REV. 553, 557 (1993) (recognizing that America borrowed several forfeiture statutes from England); Mark A. Jankowski, Note, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165, 174 (1990) (explaining that application of deodand concept has produced severe results in American law); Christine Meyer, Comment, *Zero Tolerance for Forfeiture: A Call for Reform of Civil Forfeiture Law*, 5 NOTRE DAME J.L. ETHICS & PUB. POL’Y 853, 865 (1991) (suggesting that forfeiture principle in United States is derived from English deodand concept). See generally William P. Nelson, Comment, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309, 1313 (1992) (implying that provisions in modern forfeiture statutes were influenced by antiquated forfeiture doctrines).

24. 318 U.S. 133 (1943).

25. *C.J. Hendry*, 318 U.S. at 139; see, e.g., *Austin*, 113 S. Ct. at 2807 (realizing that Congress first passed statutes requiring forfeiture of cargos and ships involved in customs offenses); *Pearson Yacht*, 416 U.S. at 683 (concluding that shortly after adoption of Constitution, vessels used to transport slaves to foreign countries were subject to forfeiture); *Boyd*, 116 U.S. at 623 (commenting that Congress’s first statute concerning collection of duties provided for forfeiture); see also James B. Speta, Note, *Narrowing the Scope of Civil*

allowing these in rem proceedings was justified by deeming the object to be the defendant.²⁶

B. *The Notion of "Guilty Property"*

Modern forfeiture statutes, largely influenced by the deodand doctrine, are based on the fictional notion of "guilty property."²⁷ The myth of

Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment, 89 MICH. L. REV. 165, 171 (1990) (recognizing that early criminal forfeiture cases strictly interpreted statutes in favor of defendants). See generally Eric G. Zajac, *Tenancies by the Entirety and Federal Civil Forfeiture Under the Crime Abuse Prevention and Control Act: A Clash of Titans*, 54 U. PITT. L. REV. 553, 557 (1993) (conceding that early American law absorbed forfeiture statutes from England); Christine Meyer, Comment, *Zero Tolerance for Forfeiture: A Call for Reform of Civil Forfeiture Law*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 853, 865 (1991) (tracing historical distinctions between civil and criminal forfeiture).

26. See, e.g., *Goldsmith-Grant Co.*, 254 U.S. at 511 (mandating that thing is considered offender); *The Palmyra*, 25 U.S. at 15 (asserting that in rem proceedings are independent of in personam proceedings); *Logan v. United States*, 260 F. 746, 749 (5th Cir. 1919) (attributing guilt to automobile used to transport whiskey); *United States v. One Saxon Auto.*, 257 F. 251, 251 (4th Cir. 1919) (ascribing guilt to car used to transport spirituous liquors); *United States v. Mincey*, 254 F. 287, 288 (5th Cir. 1918) (condemning automobile despite owner's nonparticipation in illegal use of property); *United States v. 246½ Pounds of Tobacco*, 103 F. 791, 791 (N.D. Wash. 1900) (naming tobacco used for cigars as defendant in forfeiture action); *United States v. Two Hundred Twenty Patented Machines*, 99 F. 559, 560 (E.D. Pa. 1900) (mandating forfeiture of guilty machines used to remove cigars without using proper stamps). *But cf.* *United States v. Stowell*, 133 U.S. 1, 6 (1890) (stressing that property by itself does not have guilty character). See generally Lalit K. Loomba, Note, *The Innocent Owner Defense to Real Property Forfeiture Under the Comprehensive Crime Control Act of 1984*, 58 FORDHAM L. REV. 471, 473 (1989) (asserting that notion of guilty property is legal fiction); Damon G. Saltzburg, Note, *Real Property Forfeitures as a Weapon in the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. REV. 217, 220 (1992) (noting that late 19th-century government prosecutors used notion of guilty property to ensure forfeiture).

27. See, e.g., *Austin v. United States*, 113 S. Ct. 2801, 2807 (1993) (applying deodand doctrine to modern forfeiture statute); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974) (presuming that English statutory forfeiture was "likely a product of the confluence and merger of the deodand tradition"); *United States v. United States Coin & Currency*, 401 U.S. 715, 719 (1971) (illustrating that centuries of history supported Government's assertion that forfeiture statutes have extraordinarily broad scope); *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 511 (1921) (warning that concept of forfeiture "is too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced"); see also Mark A. Jankowski, Note, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165, 172 (1990) (showing that idea of guilty property is based on deodand concept); Christine Meyer, Comment, *Zero Tolerance for Forfeiture: A Call for Reform of Civil Forfeiture Law*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 853, 866 (1991) (contending that ideas of guilty property and deodand lead to unjust results). See generally David J. Stone, Note, *The Opportunity of Austin v. United States: Toward a Functional Approach to Civil Forfeiture and the Eight Amendment*, 73 B.U. L. REV. 427, 431 (1993) (proposing that deodand

guilty property, which Blackstone called a superstition inherited from “the blind days of popury,”²⁸ is based on the notion that, through some illegal activity or use, the implement itself has been corrupted and therefore is subject to confiscation.²⁹ In these instances, guilt or innocence of the owner of the property is irrelevant because it is not the person who is the accused, but the property itself.³⁰ An extreme application of the guilty property notion is found in the United States Supreme Court’s 1974 decision of *Calero-Toledo v. Pearson Yacht Leasing Co.*³¹ In *Pearson Yacht*, a pleasure yacht leased to residents of Puerto Rico was seized and forfeited after police found one marijuana cigarette aboard the vessel.³² Although the owner “was wholly innocent of knowing that the

developed into civil in rem forfeiture proceedings); Jack Yoskowitz, Comment, *The War on the Poor: Civil Forfeiture of Public Housing*, 25 COLUM. J.L. & SOC. PROBS. 567, 572 (1992) (suggesting that government relies on antiquated legal fiction to avoid property owners’ constitutional rights).

28. 1 WILLIAM BLACKSTONE, COMMENTARIES *300; see *Goldsmith-Grant Co.*, 254 U.S. at 510 (depicting Congress’s forfeiture laws as granting personality to property); cf. James R. Maxeiner, Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768, 770 (1977) (recognizing that property forfeiture is one of oldest penalties of Anglo-American law); Susan J. Parcels, Comment, *An Analysis of Federal Drug-Related Civil Forfeiture*, 34 ME. L. REV. 435, 435 (1982) (indicating that, from Civil War to present day, forfeiture in United States has mainly concerned in rem civil actions).

29. See *Dobbins’s Distillery v. United States*, 96 U.S. 395, 402 (1877) (applying forfeiture to “guilty” distillery); see also *Austin*, 113 S. Ct. at 2808 (recognizing property as “guilty” of offense). See generally Mark A. Jankowski, Comment, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165, 172 (1990) (suggesting guilty property fiction justifies forfeiture as sanction against object); Christine Meyer, Comment, *Zero Tolerance for Forfeiture: A Call for Reform of Civil Forfeiture Law*, 5 NOTRE DAME J.L. ETHICS & PUB. POL’Y 853, 865 (1991) (reflecting view that biblical practices recognized guilty chattel was accursed); William P. Nelson, Comment, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309, 1313 (1992) (suggesting “guilty property” notion derived from Old Testament).

30. See, e.g., *United States v. Stowell*, 133 U.S. 1, 20 (1890) (finding forfeiture of horses used for illegal purposes); *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 234 (1844) (holding ship responsible for torts of crew and master); *United States v. Mincey*, 254 F. 287, 288 (5th Cir. 1918) (providing for forfeiture of car); *United States v. One Black Horse*, 129 F. 167, 171 (D. Me. 1904) (finding seizure and forfeiture of horse); see also David J. Stone, Note, *The Opportunity of Austin v. United States: Toward a Functional Approach to Civil Forfeiture and the Eighth Amendment*, 73 B.U. L. REV. 427, 431-32 (1993) (declaring that forfeiture proceedings circumvent individual and attach to property). See generally Jack Yoskowitz, Comment, *The War on the Poor: Civil Forfeiture of Public Housing*, 25 COLUM. J.L. & SOC. PROBS. 567, 572 (1992) (reiterating that property, not owner, is defendant in forfeiture actions).

31. 416 U.S. 663 (1974).

32. *Pearson Yacht*, 416 U.S. at 693 (Douglas, J., dissenting). The Court stated that forfeiture of property used to violate drug laws serves the purposes of the criminal statutes by inflicting an economic penalty and by preventing further illegal use of the property. *Id.*

lessee was using the vessel illegally,"³³ the twenty thousand dollar yacht was nevertheless forfeited.³⁴ The Supreme Court held that the owner-lessee voluntarily entrusted possession of the yacht to the lessees and that the leasing company failed to offer proof that "the company did all that it reasonably could to avoid having its property put to an unlawful use."³⁵ In a notable dissent, Justice Douglas recognized that the notion of guilty property is a fiction and depicted the case as "one of extreme hardship."³⁶

Although modern jurisprudence emphasizes the individual's duty of care, blaming not the ship which sinks or the dog that bites, but instead attributing liability to the person controlling the offending property, the fiction of guilty property still persists in forfeiture law.³⁷ The durability of this falsehood may clearly be attributed to its effectiveness.³⁸ Modern

at 679. In addition, the Court asserted that forfeiture provisions applied to innocent lessors "may have the desirable effect of inducing them to exercise greater care in transferring possession of their property." *Id.* at 688.

33. *Id.* at 692 (Douglas, J., dissenting).

34. *Pearson Yacht*, 416 U.S. at 690. *But see* *Peisch v. Ware*, 8 U.S. (4 Cranch) 347, 364 (1808) (stating that innocent owner of property cannot be punished by forfeiture).

35. *Pearson Yacht*, 416 U.S. at 690.

36. *Id.* at 693 (Douglas, J., dissenting). Justice Douglas found, under the Fifth Amendment, "a taking of private property 'for public use'" and determined that the innocent owner should be paid compensation. *Id.* at 694; *see Peisch*, 8 U.S. at 365 (declaring that "[t]he law is not understood to forfeit the property of owners or consignees, on account of the misconduct of mere strangers, over whom such owners or consignees could have no control"). *See generally* Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1390 (1993) (recognizing that individual liberties have suffered in drug war); Christine Meyer, Comment, *Zero Tolerance for Forfeiture: A Call for Reform of Civil Forfeiture Law*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 853, 867 (1991) (praising Justice Douglas for his recognition that guilty property idea is fiction); Susan J. Parcels, Comment, *An Analysis of Federal Drug-Related Civil Forfeiture*, 34 ME. L. REV. 435, 436 (1982) (contending that government prosecutors persuade reluctant judges to provide for forfeiture of chattels belonging to innocent owners).

37. *See, e.g., Austin*, 113 S. Ct. at 2808-09 (discussing "venerable history" of guilty property fiction); *Dobbins's Distillery*, 96 U.S. at 401 (holding offense attached to distillery); *Brig Malek Adhel*, 43 U.S. at 233 (writing that forfeiture attaches to guilty instrument); *see also Goldsmith-Grant Co.*, 254 U.S. at 510 (ascribing power of complicity in wrong to object itself). *See generally* David J. Stone, Note, *The Opportunity of Austin v. United States: Toward a Functional Approach to Civil Forfeiture and the Eighth Amendment*, 73 B.U. L. REV. 427, 431 (1993) (announcing that forfeiture avoids traditional way of policing crimes by prosecuting individuals); Jack Yoskowitz, Comment, *The War on the Poor: Civil Forfeiture of Public Housing*, 25 COLUM. J.L. & SOC. PROBS. 567, 572 (1992) (intimating that worst aspect of forfeiture actions is government's reliance on ancient legal fiction).

38. *See United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126, 1133 (1993) (indicating that modern forfeiture statutes are "important expansion of governmental power"); *United States v. \$8850 in United States Currency*, 461 U.S. 555, 557-58 (1983) (exploring

forfeiture statutes provide for civil in rem proceedings against property rather than for other types of proceedings against the owner of the property.³⁹ As further discussed in section III(B) below, this procedural approach, under which the owner is not even a token party, gives government prosecutors several important advantages in their pursuit of the property, making forfeiture a relatively easy matter.⁴⁰

circumstances and reasons requiring judicial forfeiture actions); *see also* Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1325 (1991) (depicting “rapidly accelerating tendency for the government to punish antisocial behavior with civil remedies such as injunctions, forfeitures, restitution, and civil fines”); Lalit K. Loomba, Note, *The Innocent Owner Defense to Real Property Forfeiture Under the Comprehensive Crime Control Act of 1984*, 58 FORDHAM L. REV. 471, 474 (1989) (suggesting that procedural rules concerning civil forfeiture proceedings favor government). *See generally* Jack Yoskowitz, Comment, *The War on the Poor: Civil Forfeiture of Public Housing*, 25 COLUM. J.L. & SOC. PROBS. 567, 575 (1992) (conceding government meets burden of probable cause easily by filing only verified complaint).

39. *See, e.g.*, *United States v. 6250 Ledge Rd.*, 943 F.2d 721, 722 (7th Cir. 1991) (initiating forfeiture action against residence); *United States v. 4492 S. Livonia Rd.*, 889 F.2d 1258, 1260 (2d Cir. 1989) (seeking forfeiture of 120 acres of land, houses, two barns, and several small buildings); *United States v. 3639 2nd St.*, 869 F.2d 1093, 1094–95 (8th Cir. 1989) (pursuing forfeiture proceeding against real property but not its owner), *cert. denied*, 498 U.S. 1106 (1991); *United States v. 900 Rio Vista Blvd.*, 803 F.2d 625, 628–30 (11th Cir. 1986) (placing burden on government to show probable cause that substantial connection exists between property to be forfeited and alleged crime); *One Blue 1977 AMC Jeep CJ-5 v. United States*, 783 F.2d 759, 760–61 (8th Cir. 1986) (bringing forfeiture action against jeep); *United States v. One 1974 Cadillac Eldorado*, 575 F.2d 344, 345 (2d Cir. 1978) (*per curiam*) (reviewing forfeiture action against car used for illegal purposes); *United States v. \$12,585 in United States Currency*, 669 F. Supp. 939, 942 (D. Minn. 1987) (requiring forfeiture of guilty money), *aff'd in part and rev'd in part sub nom. United States v. 3639 2nd St.*, 869 F.2d 1093 (8th Cir. 1989), *cert. denied*, 498 U.S. 1106 (1991); *United States v. Certain Lots in Virginia Beach*, 657 F. Supp. 1062, 1064–65 (E.D. Va. 1987) (ordering forfeiture of extensive beachfront property). *See generally* Lalit K. Loomba, Note, *The Innocent Owner Defense to Real Property Forfeiture Under the Comprehensive Crime Control Act of 1984*, 58 FORDHAM L. REV. 471, 473 (1989) (noting that in rem forfeiture proceedings are based on legal fiction that property itself is guilty); Christine Meyer, Comment, *Zero Tolerance for Forfeiture: A Call for Reform of Civil Forfeiture Law*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 853, 866 (1991) (noting in rem forfeiture operates against property due to unlawful use of res).

40. *See United States v. 121 Nostrand Ave.*, 760 F. Supp. 1015, 1032 (E.D.N.Y. 1991) (asserting that “[s]tatutory shifting of the burden of proof stacks the deck heavily in favor of the Government”); *see also United States v. \$364,960 in United States Currency*, 661 F.2d 319, 324–25 (Former 5th Cir. Unit B Nov. 1981) (allowing circumstantial evidence for probable cause determination in civil forfeiture action). *See generally* Lalit K. Loomba, Note, *The Innocent Owner Defense to Real Property Forfeiture Under the Comprehensive Crime Control Act of 1984*, 58 FORDHAM L. REV. 471, 474 (1989) (noting that procedural rules governing civil forfeiture actions favor government); William P. Nelson, Comment, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance With Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309, 1319

III. 21 U.S.C. § 881: THE CIVIL FORFEITURE STATUTE

A. *Origins and Purposes of the Modern Forfeiture Statute*

In an attempt to respond to the serious national problem of illegal drug trafficking, the Ninety-first Congress passed the Comprehensive Drug Abuse Prevention and Control Act of 1970.⁴¹ Senator Robert Byrd, expressing Congress's desire to use forfeiture to punish and deter drug dealers, asserted that "[b]y removing its leaders from positions of ownership . . . , and by visiting heavy economic sanctions on their predatory business practices, this legislation should prove to be a mighty deterrent to any further expansion of organized crime's economic power."⁴² As enacted, the Forfeiture Statute authorized federal prosecutors to bring forfeiture actions against certain personal properties, such as boats, cars, and pro-

(1992) (stressing that rules in judicial forfeiture actions are biased in government's favor); Jack Yoskowitz, Comment, *The War on the Poor: Civil Forfeiture of Public Housing*, 25 COLUM. J.L. & SOC. PROBS. 567, 575 (1992) (recognizing that if owner produces no evidence to counter government showing of probable cause that property is subject to forfeiture, summary judgment must be granted for government).

41. Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended in scattered sections of 21 U.S.C. and 42 U.S.C.); see S. REP. NO. 225, 98th Cong., 2d Sess. 191 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3374 (reporting that "the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs which, with its inevitable attendant violence, is plaguing the country"); see also *United States v. One 1972 Datsun*, 378 F. Supp. 1200, 1205 (D.N.H. 1974) (contending that main congressional purpose of Forfeiture Statute is to cripple illicit drug trafficking and activity).

42. 116 CONG. REC. 607 (1970). The forfeiture provisions were intended to strip criminals of their economic power. See S. REP. NO. 225, 98th Cong., 2d Sess. 191 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3374 (warning that convictions of narcotics dealers are not productive if economic bases are left intact).

duction equipment.⁴³ However, due to its less than extensive coverage, the statute saw limited application in its first eight years.⁴⁴

In 1978, Congress extended the reach of the Forfeiture Statute by adding subsection 881(a)(6), which provides for the forfeiture of anything of value used or intended to be used by any person to purchase illegal drugs.⁴⁵ This amendment greatly expanded the scope of the statute.⁴⁶

43. Section 881(a) reads in pertinent part:

§ 881. Forfeitures

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

.....

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter;

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and

(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

21 U.S.C. § 881(a)(4) (1988).

44. See GENERAL ACCOUNTING OFFICE, ASSET FORFEITURE—A SELDOM USED TOOL IN COMBATTING DRUG TRAFFICKING 12 (1981) (reporting that less than \$30 million had been seized under all forfeiture statutes from 1976 to 1979); see also William P. Nelson, Comment, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309, 1315 (1992) (showing limited application of Comprehensive Drug Abuse Prevention and Control Act of 1970); Sean D. Smith, Comment, *The Scope of Real Property Forfeiture for Drug-Related Crimes Under the Comprehensive Forfeiture Act*, 137 U. PA. L. REV. 303, 303 (1988) (arguing that Comprehensive Drug Abuse and Control Act of 1970 had limited success).

45. Psychotropic Substances Act of 1978, Pub. L. No. 95-633, tit. III, § 301(a), 92 Stat. 3768, 3777 (codified as amended at 21 U.S.C. § 881(a)(6) (1988)). Subsection 881(a)(6) provides in pertinent part:

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

.....

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an ex-

Not only are all proceeds traceable to the purchase of a controlled substance now forfeitable, but forfeiture is required for any negotiable instrument or money intended to facilitate felony violations of the federal narcotics laws.⁴⁷ The broad sweep of this amendment allowed the United States Drug Enforcement Administration (DEA) to increase the quantity of forfeitures twenty times over during the amended law's first year in effect.⁴⁸

change, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter. . . .

21 U.S.C. § 881(a)(6) (1988). Senator Sam Nunn, expressing the reason for the amendment, announced that in the drug fight "we were losing the battles as well as the war." 124 CONG. REC. 23,055 (1978). Senator Nunn explained the forfeiture goal of deterrence by stating that "[w]e cannot forget that profit, astronomical profit, is the base motivation of drug traffickers. The amendment I propose here today is intended to enhance the efforts to reduce the flow of illicit drugs in the United States by striking out against the profits from illegal drug trafficking." *Id.*

46. See William P. Nelson, Comment, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309, 1315 (1992) (explaining that sweep of 1978 amendment is considerable); see also Mark A. Jankowski, Note, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165, 169 (1990) (noting that along with forfeiture power expansion, 1978 amendment included broader innocent owner provision). According to Senator John Culver, the 1978 amendment "broadens existing forfeiture law." 124 CONG. REC. 23,056 (1978).

47. See Damon G. Saltzburg, Note, *Real Property Forfeitures as a Weapon in the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. REV. 217, 221 (1992) (recognizing that 1978 amendment widened forfeiture to "all proceeds traceable" to illegal drug exchange); see also Peter A. Winn, *Seizures of Private Property in the War Against Drugs: What Process is Due?*, 41 SW. L.J. 1111, 1123 (1988) (explaining that courts interpret "other things of value" language in 1978 amendment to include jewelry, horses, valuable coins, bank accounts, and gold bullion). See generally Mark A. Jankowski, Note, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165, 169 (1990) (reiterating that 1978 amendment to Comprehensive Drug Abuse Prevention and Control Act of 1970 extended reach of forfeiture beyond vehicles and equipment); William P. Nelson, Comment, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309, 1315 (1992) (showing that 1978 amendment made anything of value forfeitable if used to buy controlled substance).

48. See GENERAL ACCOUNTING OFFICE, ASSET FORFEITURE—A SELDOM USED TOOL IN COMBATTING DRUG TRAFFICKING 13 (1981) (depicting growth of forfeiture due to 1978 amendment); John Dombink et al., *Fighting for Fees—Drug Trafficking and the Forfeiture of Attorney's Fees*, 18 J. DRUG ISSUES 421, 432 (1988) (quoting one lawyer concerning forfeiture acts as saying "[w]hat we are now facing is the dream of the government"); see also Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1434 (1993) (explaining that forfeiture laws make defense attorneys vulnerable to vindictive prosecutors).

Congress further expanded the breadth of the Forfeiture Statute through an amendment enacted as part of the Crime Control Act of 1984.⁴⁹ This amendment added a potent provision providing for the forfeiture of real property, which previously was not covered under the statute.⁵⁰ In addition, the amendment added subsection 881(h), which encompasses what is commonly known as the "relation-back doctrine."⁵¹ This doctrine provides that all interest in property subject to civil forfeiture will vest in the United States government when acts giving rise to forfeiture are committed.⁵² Thus, when land is purchased or used in violation of federal drug laws, all of the owner's rights in the land immedi-

49. Pub. L. No. 98-473, tit. II, § § 306, 309, 518, 98 Stat. 1837, 2050-51, 2075 (1984) (codified as amended at 21 U.S.C. § 881 (1988)).

50. The provision added by the amendment reads in pertinent part:

All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this subchapter punishable by more than one year's imprisonment (is subject to forfeiture)

21 U.S.C. § 881(a)(7) (1988). Congress intended to improve efforts to control drug use by eliminating "the statutory limitations and ambiguities that have frustrated active pursuit of forfeiture by federal law enforcement agencies." S. REP. NO. 225, 98th Cong., 2d Sess. 192 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3375; *see* *United States v. Santoro*, 866 F.2d 1538, 1541-42 (4th Cir. 1989) (enforcing forfeiture of 26 acres of land pursuant to § 881(a)(7)); *see also* Peter A. Winn, *Seizures of Private Property in the War Against Drugs: What Process is Due?*, 41 Sw. L.J. 1111, 1127-28 (1988) (recognizing great increase in number of Justice Department forfeitures since 1984 amendment).

51. The relation-back provision added to § 881 by the 1984 amendment states that "all right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section." 21 U.S.C. § 881(h) (1988). Congress, in enacting this provision, hoped to "close a potential loophole" that would allow escape from forfeiture through dealings which "were not 'arm's length' transactions." S. REP. NO. 225, 98th Cong., 1st Sess. 191, 201 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3374, 3383-84; *see* *United States v. 1314 Whiterock*, 571 F. Supp. 723, 725 (W.D. Tex. 1983) (announcing that "[b]ecause forfeiture actually occurs at the moment of illegal use, no third party can acquire a legally recognizable interest in the property after the activity that subjects it to forfeiture"); *see also* Mark A. Jankowski, Note, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165, 170-71 (1990) (suggesting Congress included relation-back doctrine to protect against sham transactions designed to shelter forfeitable property).

52. *See, e.g.,* *Simons v. United States*, 541 F.2d 1351, 1352 (9th Cir. 1976) (requiring invalidation of innocent purchaser's title because it was acquired after illegal use); *Florida Dealers & Growers Bank v. United States*, 279 F.2d 673, 677 (5th Cir. 1960) (finding that when revenue statutes are violated, forfeiture immediately takes place); *Wingo v. United States*, 266 F.2d 421, 423 (5th Cir. 1959) (explaining that under relation-back doctrine property was immediately marked when illegal event occurred); *Weathersbee v. United States*, 263 F.2d 324, 326 (4th Cir. 1958) (illustrating that "[w]hen an automobile is used in violation of the Internal Revenue Laws, it becomes legally forfeited at that time, even though it is not seized until later"); *see also* *United States v. Stowell*, 133 U.S. 1, 16-17

ately transfer to the United States, regardless of when the forfeiture proceeding is initiated.⁵³

Legislative history suggests that Congress intended application of the real property provision to be limited to forfeiture of drug manufacturing or storage facilities.⁵⁴ However, the statute has not been interpreted so narrowly by the courts, primarily because of the provision's broad wording.⁵⁵ As a result, properties such as fraternity houses,⁵⁶ hotels,⁵⁷

(1890) (noting that owner is divested of title at time prohibited act takes place and that United States gains right to property).

53. See, e.g., *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126, 1137 (1993) (warning that although it is immediately vested with title, government may not use relation-back doctrine until forfeiture judgment has been signed); *Stowell*, 133 U.S. at 16-17 (noting that in relation-back doctrine, government title is not perfected until judiciary condemns property, even though title technically vests at moment illegal act is committed); *1314 Whiterock*, 571 F. Supp. at 725 (recognizing that in relation-back doctrine, title vests in sovereign when illegal act occurs); see also *United States v. \$41,305 in Currency & Traveler's Checks*, 802 F.2d 1339, 1346 (11th Cir. 1986) (establishing that under relation-back principle, "[i]llegal use immediately vests title to the property in the sovereign, and cuts off the rights of third parties to obtain legally protectible interests in the property"). See generally Mark A. Jankowski, Note, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165, 175-76 (1990) (proposing that relation-back doctrine relies on guilty property fiction rooted in deodand doctrine and that doctrine fails to adequately protect innocent owners).

54. See S. REP. NO. 225, 98th Cong., 1st Sess. 195 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3378 (inferring that Congress intended § 881(a)(7), added to statute by Crime Control Act of 1984, to be restricted in scope); see also William P. Nelson, Comment, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309, 1316 (1992) (arguing that legislative history intimates that Congress meant real property forfeiture provision to apply only to drug manufacturing or storage facilities). The Senate Report addressing the amendment states:

Under current law, if a person uses a boat or car to transport narcotics or uses equipment to manufacture dangerous drugs, his use of the property renders it subject to civil forfeiture. But if he uses a secluded barn to store tons of marijuana or uses his house as a manufacturing laboratory for amphetamines, there is no provision to subject his real property to civil forfeiture, even though its use was indispensable to the commission of a major drug offense and the prospect of the forfeiture of the property would have been a powerful deterrent.

Id. But see *United States v. 916 Douglas Ave.*, 903 F.2d 490, 493 (7th Cir. 1990) (rejecting legislative history and holding that Congress intended to subject all real property that promotes drug trade to forfeiture), *cert. denied*, 498 U.S. 1126 (1991).

55. See, e.g., *916 Douglas Ave.*, 903 F.2d at 494 (declaring that plain wording of statute requires that real estate used "in any manner or part" to commit drug offense must be forfeited); *United States v. \$5,644,540 in United States Currency*, 799 F.2d 1357, 1362-63 (9th Cir. 1986) (refusing to require substantial connection between property and illegal activity for forfeiture); *United States v. \$93,685.61 in United States Currency*, 730 F.2d 571, 572 (9th Cir. 1980) (per curiam) (concluding that circumstantial evidence of narcotics transactions satisfies probable cause requirement in forfeiture actions), *cert. denied*, 469 U.S. 831 (1984); see also James B. Speta, Note, *Narrowing the Scope of Civil Drug Forfeiture*

ranches,⁵⁸ and private residences have been seized, even though many were not used to store or manufacture drugs.⁵⁹

B. *Forfeiture Procedures Under the Statute*

Pursuant to the Forfeiture Statute, a civil forfeiture proceeding begins with the constructive or actual seizure of the property after a warrant has been issued by the district court.⁶⁰ The government shoulders the initial burden of proof required for the warrant. Government prosecutors must

ture: Section 881, Substantial Connection and the Eighth Amendment, 89 MICH. L. REV. 165, 167 (1990) (suggesting that courts should allow forfeiture only if substantial connection exists between property and illegal activity).

56. See B. Drummond Ayres, Jr., *11 Held and 3 Fraternities Seized in Drug Raids at U. of Virginia*, N.Y. TIMES, Mar. 23, 1991, at 1 (discussing seizure of three fraternity houses after police searched rooms and found drugs); see also Christine Meyer, Comment, *Zero Tolerance for Forfeiture: A Call for Reform of Civil Forfeiture Law*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 853, 853 (1991) (asserting that seizure of fraternity house for drug violations of residents is ridiculous).

57. See *United States v. 4880 S.E. Dixie Highway*, 838 F.2d 1558, 1566 (11th Cir. 1988) (remanding case to determine if owners of resort could receive attorney fees after prevailing in forfeiture action).

58. See *United States v. 4492 S. Livonia Rd.*, 889 F.2d 1258, 1260 (2d Cir. 1989) (affirming forfeiture of 120-acre estate with two barns, house, and several outbuildings); *United States v. Parcels of Land*, 884 F.2d 41, 44-45 (1st Cir. 1989) (upholding forfeiture of 18 acres, including home and other structures).

59. See, e.g., *United States v. 3639 2nd St.*, 869 F.2d 1093, 1096 (8th Cir. 1989) (providing for forfeiture of home because two ounces of cocaine were sold there), *cert. denied*, 498 U.S. 1126 (1991); *United States v. Santoro*, 866 F.2d 1538, 1540-43 (4th Cir. 1989) (finding forfeiture of family residence and 26 acres of land), *cert. denied*, 498 U.S. 1126 (1991); *United States v. 30.80 Acres*, 665 F. Supp. 422, 428 (E.D.N.C. 1987) (subjecting house and tract of land to forfeiture), *aff'd sub nom. United States v. Reynolds*, 856 F.2d 675 (4th Cir. 1988); *United States v. 23639 Meetinghouse Rd.*, 633 F. Supp. 979, 986 (E.D. Pa. 1986) (finding forfeiture of home because property interest immediately divested when property was used in violation of drug laws).

60. 21 U.S.C. § 881(b) provides:

(b) Any property subject to civil forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when—

- (1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;
- (2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this subchapter;
- (3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or
- (4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this subchapter.

show probable cause for the belief that the property is subject to forfeiture.⁶¹ This initial burden of proof allocation significantly favors the government.⁶²

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly. The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure.

21 U.S.C. § 881(b)(1982 & Supp. V 1987); see S. REP. NO. 225, 98th Cong., 2d Sess. 193 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3376 (conceding that “[s]ince civil forfeiture is an in rem proceeding, the forfeiture case must be brought in the judicial district in which the property is located”). See generally Eric G. Zajac, *Tenancies by the Entirety and Federal Civil Forfeiture Under the Crime Abuse Prevention and Control Act: A Clash of Titans*, 54 U. PITT. L. REV. 553, 558 (1993) (noting that prosecutors seize property after district court issues warrant to begin forfeiture proceeding); William P. Nelson, Comment, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309, 1319 (1992) (declaring that when property is valued at less than \$100,000, property is subject to forfeiture in administrative proceeding if owner does not object); Damon G. Saltzburg, Note, *Real Property Forfeitures as a Weapon in the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. REV. 217, 222-23 (1992) (writing that government has five years to initiate forfeiture proceeding after issuance of warrant to seize property); Michael Schecter, Note, *Fear and Loathing and the Forfeiture Laws*, 75 CORNELL L. REV. 1151, 1170 (1990) (determining that admiralty mechanism for forfeiture has been used to circumvent warrant requirement of Fourth Amendment).

61. See, e.g., *United States v. 4492 S. Livonia Rd.*, 889 F.2d 1258, 1267 (2d Cir. 1989) (determining that burden is initially on government to show probable cause in asserting right to forfeiture); *United States v. One 56-Foot Motor Yacht Named Tahuna*, 702 F.2d 1276, 1282 (9th Cir. 1983) (contending that “[t]he determination of probable cause in a forfeiture proceeding simply involves the question whether the information relied on by the government is adequate and sufficiently reliable to warrant the belief by a reasonable person that the [res] was used to transport controlled substances”); *United States v. One 1978 Chevrolet Impala*, 614 F.2d 983, 984 (5th Cir. 1980) (defining probable cause as “reasonable ground for belief of guilt, supported by less than prima facie proof, but more than mere suspicion”); see also Andrew Schneider & Mary P. Flaherty, *Government Seizures Victimize Innocent*, PITT. PRESS, Aug. 11, 1991, at A1 (stating government can seize house without any greater evidence than is needed to look inside). See generally Damon G. Saltzburg, Note, *Real Property Forfeitures as a Weapon in the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. REV. 217, 223 (1992) (determining that in civil forfeiture action, government institutes action by showing probable cause); David J. Stone, Note, *The Opportunity of Austin v. United States: Toward a Functional Approach to Civil Forfeiture and the Eighth Amendment*, 73 B.U. L. REV. 427, 432 (1993) (recognizing that police seize property on probable cause showing).

62. See *United States v. Johnson*, 572 F.2d 227, 234 (9th Cir.) (depicting probable cause standard for forfeiture as more lenient than requirements to obtain search warrant), cert. denied, 437 U.S. 907 (1978); see also *United States v. \$364,960 in United States Currency*, 661 F.2d 319, 324-25 (Former 5th Cir. Unit B. Nov. 1981) (allowing circumstantial evidence in determining probable cause); *United States v. Route 2, Box 61-C*, 727 F. Supp. 1295, 1298 (W.D. Ark. 1990) (asserting probable cause does not require prima facie proof);

In a criminal forfeiture action, the government must prove all elements of the crime beyond a reasonable doubt.⁶³ In civil forfeiture proceedings, however, the government need only establish the probable cause definition of “reasonable ground for belief of guilt” to initiate the action.⁶⁴ Be-

cf. *United States v. One 1963 Cadillac Hardtop*, 231 F. Supp. 27, 29 (E.D. Wis. 1964) (noting in criminal cases, government must prove case beyond reasonable doubt). *But see* *United States v. One 1974 Porsche 911-S*, 682 F.2d 283, 285 (1st Cir. 1982) (asserting that standard for probable cause in civil forfeiture actions is roughly same as search and seizure cases). *See generally* Lalit K. Loomba, Note, *The Innocent Owner Defense To Real Property Forfeiture Under the Comprehensive Crime Control Act of 1984*, 58 *FORDHAM L. REV.* 471, 474 (1989) (explaining that procedural rules in civil forfeiture proceedings favor government); Damon G. Saltzburg, Note, *Real Property Forfeitures as a Weapon in the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 *B.U. L. REV.* 217, 223–24 (1992) (inferring that procedural advantages in civil forfeiture actions lead prosecutors to seek civil, rather than criminal forfeiture).

63. *See* *United States v. McKeithen*, 822 F.2d 310, 312 (2d Cir. 1987) (specifying government burden of proof is beyond reasonable doubt in criminal forfeiture actions); *United States v. Huber*, 603 F.2d 387, 396 (2d Cir. 1979) (finding that forfeiture is imposed “directly on an individual as part of a criminal prosecution rather than in a separate proceeding in rem against the property subject to forfeiture”), *cert. denied*, 445 U.S. 927 (1980); *see also* Michael Goldsmith & Mark J. Linderman, *Asset Forfeiture and Third Party Rights: The Need for Further Law Reform*, 1989 *DUKE L.J.* 1254, 1262 (recognizing that civil forfeiture requires lesser burden of proof than criminal forfeiture); Christine Meyer, Comment, *Zero Tolerance for Forfeiture: A Call for Reform of Civil Forfeiture Law*, 5 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 853, 855 (1991) (reiterating that criminal prosecutions mandate beyond reasonable doubt standard).

64. *See, e.g., One 1978 Chevrolet Impala*, 614 F.2d at 984 (finding that “probable cause necessary here is a reasonable ground for belief of guilt, supported by less than prima facie proof but more than mere suspicion”); *United States v. One 1975 Ford F100 Pickup Truck*, 558 F.2d 755, 756 (5th Cir. 1977) (recognizing government need only show probable cause that truck was used to facilitate concealment, possession, or transportation of controlled substance); *United States v. One 1971 Chevrolet Corvette*, 496 F.2d 210, 212 (5th Cir. 1974) (explaining that government probable cause showing is satisfied by “reasonable ground for belief of guilt”); *Bush v. United States*, 389 F.2d 485, 489 (5th Cir. 1968) (announcing that government’s probable cause showing need be “no more than reasonable ground for belief in guilt”); *United States v. One 1949 Pontiac Sedan*, 194 F.2d 756, 759 (7th Cir.) (asserting that government’s probable cause requirement is more than mere suspicion), *cert. denied*, 343 U.S. 966 (1952); *One 1963 Cadillac Hardtop*, 231 F. Supp. at 29 (reiterating that “probable cause is less than prima facie legal proof and no more than a reasonable ground for belief in guilt”); *United States v. One 1955 Ford Sedan*, 164 F. Supp. 729, 736 (D. Md. 1958) (arguing that probable cause may be found even if government has less than prima facie case, but that finding must be reasonable under all circumstances); *see also* Eric G. Zajac, *Tenancies by the Entirety and Federal Civil Forfeiture Under the Crime Abuse Prevention and Control Act: A Clash of Titans*, 54 *U. PITT. L. REV.* 553, 559 (1993) (emphasizing that government prosecutors need only show probable cause for impression that property was used to sell drugs); Lalit K. Loomba, Note, *The Innocent Owner Defense to Real Property Forfeiture Under the Comprehensive Crime Control Act of 1984*, 58 *FORDHAM L. REV.* 471, 474 (1989) (maintaining that meeting reasonable ground for belief standard of probable cause is easy task); William P. Nelson, Comment, *Should the Ranch Go*

cause the determination of probable cause under the Forfeiture Statute is the same as that required under the Federal Rules of Criminal Procedure for acquiring a search warrant, the necessary showing of probable cause may be based entirely on circumstantial evidence or hearsay.⁶⁵ Thus, the government often meets its probable cause burden merely by filing a verified complaint.⁶⁶

Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture, 80 CAL. L. REV. 1309, 1320 (1992) (warning that probable cause requirement in civil forfeiture is minimal burden); Damon G. Saltzburg, Note, *Real Property Forfeitures as a Weapon in the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. REV. 217, 223 (1992) (indicating that to establish probable cause, government's complaint must show sufficient facts to afford reasonable belief that property is connected to federal drug violation).

65. See, e.g., *Franks v. Delaware*, 438 U.S. 154, 165 (1978) (suggesting that "probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be guaranteed hastily"); *Spinelli v. United States*, 393 U.S. 410, 419 (1969) (determining that probable cause requires less demanding standards than those concerning admissibility of evidence); *4492 S. Livonia Rd.*, 889 F.2d at 1267 (admitting hearsay evidence in forfeiture context because it is usual basis of showing probable cause); *United States v. 6109 Grubb Rd.*, 886 F.2d 618, 621 (3d Cir. 1989) (concluding that deposition testimony containing hearsay was admissible in civil forfeiture action); *United States v. \$250,000 in United States Currency*, 808 F.2d 895, 899 (1st Cir. 1987) (allowing probable cause showing based entirely on inadmissible evidence); *United States v. \$4,255,000 in United States Currency*, 762 F.2d 895, 904 (11th Cir. 1985) (illustrating that circumstantial evidence can suffice to support probable cause finding), *cert. denied*, 474 U.S. 1056 (1986); *United States v. \$93,685.61 in United States Currency*, 730 F.2d 571, 572 (9th Cir.) (determining that great quantity of money, in combination with other persuasive circumstantial evidence, is sufficient to establish probable cause), *cert. denied*, 469 U.S. 831 (1984); *One 56-Foot Motor Yacht Named Tahuna*, 702 F.2d at 1283 (relying on precedent to determine that probable cause to bring forfeiture actions may be based on inadmissible hearsay); *United States v. One Twin Engine Beech Airplane*, 533 F.2d 1106, 1109 (9th Cir. 1976) (allowing hearsay evidence in government's showing of probable cause); see also Michael Goldsmith & Mark J. Linderman, *Asset Forfeiture and Third Party Rights: The Need for Further Law Reform*, 1989 DUKE L.J. 1254, 1261 (conceding that government prosecutors need not show direct evidence because of reliance on circumstantial evidence). See generally Peter A. Winn, *Seizures of Private Property in the War Against Drugs: What Process is Due?*, 41 Sw. L.J. 1111, 1126 (1988) (warning that civil forfeiture procedures allow United States Attorney to seize almost any property at will).

66. See *4492 S. Livonia Rd.*, 889 F.2d at 1266 (finding government complaint sufficient despite potentially conclusory allegations); *United States v. \$39,000 in Canadian Currency*, 801 F.2d 1210, 1219 (10th Cir. 1986) (holding that complaint in civil forfeiture proceeding "must allege specific facts sufficient to support an inference that property is subject to forfeiture under the statute"). But see *United States v. Pole No. 3172*, 852 F.2d 636, 638-39 (1st Cir. 1988) (dismissing government complaint because no facts supported claim); *United States v. \$38,000 in United States Currency*, 816 F.2d 1538, 1547-48 (11th Cir. 1987) (disregarding government complaint because it lacked sufficient facts). See generally Anton R. Valukas & Thomas P. Walsh, *Forfeitures: When Uncle Sam Says You Can't Take It With You*, LITIG., Winter 1988, at 31, 34 (illustrating that initial government burden in civil

The government possesses a second decisive advantage in civil forfeiture proceedings: after probable cause is established, the burden of proof shifts to the property owner, who must either prove his innocence or show that probable cause does not exist.⁶⁷ If the owner fails to rebut the showing of probable cause, the court must grant summary judgment for the government.⁶⁸

forfeiture case is often met by filing complaint); Damon G. Saltzburg, Note, *Real Property Forfeitures as a Weapon in the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. REV. 217, 224 (1992) (indicating civil forfeiture actions allow government wider discovery to search owner than is available in criminal actions).

67. See 21 U.S.C. § 885(a)(1) (1988) (placing burden of asserting forfeiture defense on person claiming its benefit); *United States v. 141st St. Corp.*, 911 F.2d 870, 876 (2d Cir. 1990) (noting that once court rules that government has satisfied initial burden of showing probable cause, burden shifts to accused owner to prove that narcotics activity occurred without owner's knowledge or consent or that property was not used as alleged by prosecutors), *cert. denied*, 498 U.S. 1109 (1991); *United States v. 3639 2nd St.*, 869 F.2d 1093, 1095 (8th Cir. 1989) (reiterating that after probable cause showing is complete, burden shifts to owner opposing forfeiture), *cert. denied*, 498 U.S. 1126 (1991). See generally Eric G. Zajac, *Tenancies by the Entirety and Federal Civil Forfeiture Under the Crime Abuse Prevention and Control Act: A Clash of Titans*, 54 U. PITT. L. REV. 553, 559-60 (1993) (discussing shift in burden of proof that occurs once probable cause showing has been made). One court described the burden shift as follows:

Statutory shifting of the burden of proof stacks the deck heavily in favor of the Government. It can obtain forfeiture by simply showing—by less than a preponderance of the evidence—that the property was used illegally. For a claimant to remain in her home, however, she must establish a defense to forfeiture by a preponderance of the evidence. . . . [T]here is doubt about the propriety of shifting the burden of proof in quasi-criminal proceedings [to the claimant]. . . . The law would be much more comfortable with a forfeiture scheme that, at least in the case of homes, placed the entire burden on the Government to establish that forfeiture is warranted with a standard that is higher than a preponderance.

United States v. 121 Nostrand Ave., 760 F. Supp. 1015, 1032 (E.D.N.Y. 1991).

68. See, e.g., *One Blue 1977 AMC Jeep CJ-5 v. United States*, 783 F.2d 759, 762 (8th Cir. 1986) (affirming district court's summary judgment because owner failed to controvert facts relied on in probable cause showing); *One 56-Foot Motor Yacht Named Tahuna*, 702 F.2d at 1287 (finding summary judgment appropriate because owner failed to raise question of material fact); *Gaines v. Haughton*, 645 F.2d 761, 769 (9th Cir. 1981) (acknowledging that summary judgment is appropriate only when no genuine issue of material fact exists), *cert. denied*, 454 U.S. 1145 (1982); *United States v. One 1975 Mercedes 280S*, 590 F.2d 196, 199-200 (6th Cir. 1978) (affirming summary judgment because owner did not sufficiently rebut probable cause showing); see also Anton R. Valukas & Thomas P. Walsh, *Forfeitures: When Uncle Sam Says You Can't Take It With You*, LITIG., Winter 1988, at 31, 34 (explaining that government is entitled to summary judgment if owner cannot rebut probable cause showing); William P. Nelson, Comment, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309, 1319 (1992) (determining that because civil forfeiture proceedings are executed under Federal Rules of Civil Procedure, government may use expansive civil discovery and move for summary judgment).

C. Problems Created by Broad Statutory Language

As previously mentioned, Congress enacted the Forfeiture Statute to erode the economic bases of drug dealers.⁶⁹ Due to the expansive language of the statute, however, the legislation now includes people who do not derive their living from the narcotics trade.⁷⁰ In addition, courts have almost unanimously concluded that they should heed the sweeping language of the Legislature, even when the case involves not drug dealers, but personal drug users.⁷¹ One major reason for the expansion of civil

69. See *United States v. One Clipper Bow Ketch Nisku*, 548 F.2d 8, 12 (1st Cir. 1977) (expressing view that Congress's main concern in enacting § 881 was drug trafficking); *United States v. One 1972 Datsun*, 378 F. Supp. 1200, 1205 (D.N.H. 1974) (recognizing that "a purpose of vehicle forfeiture in enforcement of the narcotics laws is to prevent the flow of narcotics by depriving narcotics peddlers of the 'operating tools' of their trade, thereby financially incapacitating the illegal narcotics activity"); see also Mark A. Jankowski, Note, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165, 167 (1990) (suggesting that Congress passed Comprehensive Drug Abuse Prevention and Control Act of 1970 to defeat illegal drug trafficking and destroy drug dealers' economic bases). See generally William P. Nelson, Comment, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309, 1314 (1992) (showing that forfeiture statutes derived from recognition that drug trafficking has economic basis). As the legislative history of § 881 states:

More than ten years ago, Congress recognized in its enactment of the statutes specifically addressing organized crime and illegal drugs that the conviction of individual racketeers and drug dealers would be of only limited effectiveness if the economic power bases of criminal organizations or enterprises were left intact, and so included forfeiture authority designed to strip these offenders and organizations of their economic power. . . . Clearly, if law enforcement efforts to combat racketeering and drug trafficking are to be successful, they must include an attack on the economic aspects of these crimes. Forfeiture is the mechanism through which such an attack may be made. S. REP. NO. 225, 98th Cong., 2d Sess. 191 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3374.

70. See, e.g., *United States v. One 1976 Porsche 911S*, 670 F.2d 810, 812 (9th Cir. 1979) (upholding forfeiture despite fact that only .226 grams of marijuana were found and owner was not drug peddler); *One Clipper Bow Ketch Nisku*, 548 F.2d at 11 (allowing forfeiture of \$25,000 yacht even though marijuana was not intended for distribution); *United States v. One 1973 Dodge Van*, 416 F. Supp. 43, 46-47 (E.D. Mich. 1976) (finding forfeiture of van despite fact that small quantity of marijuana discovered was not intended for sale); see also Christine Meyer, Comment, *Zero Tolerance for Forfeiture: A Call for Reform of Civil Forfeiture Law*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 853, 882 (1991) (perceiving that courts apply broad language of statute in allowing forfeiture of property owned not by drug dealers, but by personal users); Michael Schecter, Note, *Fear and Loathing and the Forfeiture Laws*, 75 CORNELL L. REV. 1151, 1178 (1990) (showing that although legislative history indicates statute was intended to attack drug dealers, § 881 has not been interpreted to require proof of drug smuggling).

71. See *United States v. One 1973 Pontiac Grand Am*, 413 F. Supp. 163, 165 (W.D. Tex. 1976) (asserting that "[n]either smallness of quantity of the narcotics involved, nor the innocence of the owner will justify remission of the forfeiture of a vehicle used in violation

forfeiture statutes may have been the “zero-tolerance program” undertaken in the 1980s.⁷² The zero-tolerance program, which ushered in a new era of the drug war by focusing on drug users as well as drug dealers, was instituted by the Reagan Administration as a potent demand-side attack on the narcotics trade.⁷³ Although controlling drug demand is exceedingly important in the war on drugs, when law enforcement spends a large percentage of its resources seeking forfeiture of property not valuable in advancing the drug trade, the resources remaining to fight drug sellers is decreased, thereby lessening the likelihood that large-scale dealers will be apprehended.⁷⁴

of the narcotics laws”); *United States v. One 1971 Porsche Coupe Auto.*, 364 F. Supp. 745, 749 (E.D. Pa. 1973) (stating that small quantity of narcotics involved is irrelevant in civil forfeiture action); *supra* note 70 (illustrating that broad construction of statute has resulted in forfeiture of property unrelated to drug distribution or manufacture); *see also* *United States v. One 1957 Oldsmobile Auto.*, 256 F.2d 931, 932–33 (5th Cir. 1958) (providing for forfeiture of elderly woman’s car after passenger was found with “very small quantity” of marijuana); *Associates Inv. Co. v. United States*, 220 F.2d 885, 886–89 (5th Cir. 1955) (ordering forfeiture although only two marijuana cigarettes were found in vehicle).

72. *See* Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1390 (1993) (recognizing that 10 years have passed since President Ronald Reagan committed “to do what is necessary to end the drug menace” in United States); Christine Meyer, Comment, *Zero Tolerance for Forfeiture: A Call for Reform Of Civil Forfeiture Law*, 5 NOTRE DAME J.L. ETHICS & PUB. POL’Y 853, 882 (1991) (concluding that expansion of forfeiture statutes resulted from efforts to decrease demand for drugs). George Bush, in his 1988 presidential nomination acceptance speech, declared: “I want a drug-free America. . . . ‘Zero Tolerance’ isn’t just a policy, it’s an attitude [M]y Administration will be telling the dealers: Whatever we have to do, we’ll do, but your day is over, you’re history.” *1988 Republican National Convention Bush Text: “Stakes Are High and Choice is Crucial,”* L.A. TIMES, Aug. 19, 1988, at 6.

73. *See* Michael Schecter, Note, *Fear and Loathing and the Forfeiture Laws*, 75 CORNELL L. REV. 1151, 1151 (1990) (indicating that Reagan Administration’s demand-side attack caused civil forfeiture statute to expand, penalizing personal drug users). In 1988, the Reagan Administration “undertook a concerted demand-side attack on the drug trade with the establishment of the zero-tolerance policy.” *Id.* However, one commentator has stated that “it is critical to recognize that President Reagan (and later the First Lady) did not try to impose a preachment from above upon an indifferent public. Rather, they harnessed a preexisting momentum for a crackdown on drugs.” Steven Wisotsky, *Crackdown: The Emerging “Drug Exception” to the Bill of Rights*, 38 HASTINGS L.J. 889, 891 (1987). *See generally* Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1390 (1993) (suggesting that Congress asked President Reagan to “declare war on drugs”).

74. *See* Christine Meyer, Comment, *Zero Tolerance for Forfeiture: A Call for Reform of Civil Forfeiture Law*, 5 NOTRE DAME J.L. ETHICS & PUB. POL’Y 853, 882 (1991) (contending that when law enforcement focuses energy on forfeiture of private property not used for drug dealing, less time can be used to catch drug dealers). Shortly after the initiation of the zero-tolerance policy, police in Orange County, California, in two weekend sweeps, collected 52 cars valued at \$315,000. Steven Emmons, *96 Apprehended, 16 Vehicles Seized in Drug Sweep*, L.A. TIMES, Aug. 15, 1988, at B1. Although some owners of the

Another growing criticism of the statutory forfeiture scheme is that it allows law enforcement agencies to receive a portion of the proceeds from property forfeiture.⁷⁵ Thus, law enforcement personnel possess the unique power to directly augment their budgets by successfully performing a designated function.⁷⁶ This policy clearly serves as an enormous incentive for law enforcement officers to pursue asset forfeiture,⁷⁷ often

vehicles were cited for misdemeanors because they had only small quantities of drugs, the police confidently stated that under the federal guidelines, "even if only a small amount of drugs is found inside" the vehicles, the "law permits seized vehicles to be sold by law enforcement agencies to finance anti-drug law-enforcement programs." *Id.*; see also William P. Nelson, Comment, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309, 1310 (1992) (concluding that usual police approaches to crime, such as apprehending offenders and interdicting drugs, must seem boring compared to allure of forfeiture). See generally Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1397 (1993) (stressing that law enforcement activities connected with war on drugs threaten to diminish protections of numerous constitutional amendments).

75. Fred Strasser, *Forfeiture Isn't Only for Drug Kingpins*, NAT'L L.J., July 17, 1989, at 26. Some critics assert that forfeiture drives many agencies in Florida, primarily because of the extensive revenue sharing. *Id.* This often results in "reverse stings," in which undercover police personnel sell small amounts of narcotics to motorists, then confiscate their automobiles. *Id.* During the 1988 calendar year, the Broward County, Florida sheriff's office seized the following: \$1,642,647.89 in cash, eight boats valued at \$160,000, eight airplanes valued at \$520,000, and 543 vehicles valued at \$1,200,000. *Id.*; see also Michael Schecter, Note, *Fear and Loathing and the Forfeiture Laws*, 75 CORNELL L. REV. 1151, 1152 (1990) (writing that value of some seizures is disproportionate to quantity of narcotics found).

76. See William P. Nelson, Comment, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309, 1310 (1992) (determining that forfeiture money buys sophisticated equipment and manpower, while forfeited property such as boats, airplanes, and cars is used for law enforcement purposes, thus bypassing normal budgetary processes); see also Fred Strasser, *Forfeiture Isn't Only for Drug Kingpins*, NAT'L L.J., July 17, 1989, at 27 (contending that forfeiture changes usual police procedures). Forfeiture can distort traditional police practice in many ways. For example: (1) the benefits of forfeiture, combined with the lower burden of proof requirements in a civil forfeiture case, can lull police officers into careless investigative practices in criminal cases; (2) agents can be reassigned to forfeiture actions instead of pursuing convictions; (3) informants can be compromised if rewarded from forfeited assets which they testified against; and (4) agencies may be tempted not to share information that, because of forfeiture value, has an actual monetary worth. *Id.*

77. See, e.g., Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1438 (1993) (suggesting overzealous efforts to seize assets result from profit motive of government officials); William P. Nelson, Comment, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309, 1310 (1992) (perceiving that asset forfeiture is alternative to criminal prosecution); Damon G. Saltzburg, Note, *Real Property Forfeitures as a Weapon in the Government's War on Drugs*:

to the detriment of traditional efforts exerted to fight violent crimes. Additionally, by allowing law enforcement agencies to rely on forfeiture for budgeting purposes,⁷⁸ “the law, perversely, makes police departments financially dependent on the drug dealing they are supposed to curtail.”⁷⁹

A Failure to Protect Innocent Ownership Rights, 72 B.U. L. REV. 217, 223–24 (1992) (illustrating that government prosecutors use civil forfeiture instead of criminal forfeiture because likelihood of success is higher); see also Christine Meyer, Comment, *Zero Tolerance for Forfeiture: A Call for Reform of Civil Forfeiture Law*, 5 NOTRE DAME J.L. ETHICS & PUB. POL’Y 853, 883–84 (1991) (finding that incentive to pursue forfeitures arises from budget augmentation). See generally Fred Strasser, *Forfeiture Isn’t Only for Drug Kingpins*, NAT’L L.J., July 17, 1989, at 26 (contending that fundamental problem with forfeiture law is that traditional notions of criminal justice system are being altered).

78. See Peter A. Winn, *Seizures of Private Property in the War Against Drugs: What Process is Due?* 41 Sw. L.J. 1111, 1127–28 (1988) (showing that forfeiture proceedings initiated by United States Department of Justice have mushroomed since 1984). Government forfeitures averaged \$10 million a year in the late 1970s. *Id.* at 1128. In 1984, the value of property seized was \$130 million. *Id.* In 1985, this amount doubled to \$260 million, and in 1986, the value of seizures jumped to over \$500 million. *Id.* The practice of allowing forfeited assets to be used by the government creates a danger of abuses. See Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1439 (1993) (asserting that police have incentive to entrap people to seize their property). A United States General Accounting Office bulletin dated July 15, 1983 depicts several of these abuses:

[The] U.S. marshall in Houston, Texas, placed a 1-day notice for the sale of a forfeited 1961 Beechcraft Queen Air aircraft. Four days later the marshall sold the plane for \$4,000 to one of a limited group of prospective buyers who expressed interest. The plane was initially valued at \$50,000 when seized.

This type of insufficient notice was particularly disconcerting to a private marina owner in Freeport, Texas, who stored a vessel after its seizure in April 1981. During the holding period the owner received offers to buy the vessel—one was for \$24,000 and two were as high as \$40,000. The owner was personally willing to bid \$30,000. Although he requested the Marshall to notify him of the sale, the Marshall did not and sold the vessel and its equipment for \$13,000. At the time of seizure, the equipment had been appraised at \$10,000 and the vessel had been appraised at \$140,000.

COMPTROLLER GEN., U.S. GEN. ACCOUNTING OFFICE, BETTER CARE AND DISPOSAL OF SEIZED CARS, BOATS, AND PLANES SHOULD SAVE MONEY AND BENEFIT LAW ENFORCEMENT 27 (1983), quoted in Peter A. Winn, *Seizures of Private Property in the War Against Drugs: What Process is Due?*, 41 Sw. L.J. 1111, 1128 (1988).

79. John Anderson, *Mixed Messages from a Drug Bust*, N.Y. TIMES, Apr. 1, 1991, at A10. As Florida Circuit Judge Lance Andrews observed: “We don’t do big drug cases down here. Why spend time building a big wiretap case and following people around when you can run out on the street and grab 20 cars in a night?” Fred Strasser, *Forfeiture Isn’t Just for Drug Kingpins*, NAT’L L.J., July 17, 1989, at 26; see Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1440 (1993) (emphasizing that potential to bend rules arises when money for salaries of police officers comes from forfeiture). See generally James B. Speta, Note, *Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment*, 89 MICH. L. REV. 165, 166 (1990) (stressing unique potential for abuse inherent in civil forfeiture actions).

Finally, perhaps the most well-publicized criticism of civil forfeiture is that often the forfeited property's true owner is innocent of any drug offenses or other wrongdoing.⁸⁰ For example, commercial mortgage lenders,⁸¹ lessors of boats and airplanes,⁸² and parents or others who have

80. The civil forfeiture statute provides an innocent owner defense in § 881(a)(6)-(7), which states that "no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." 21 U.S.C. § 881(a)(6)-(7) (1988). A majority of the courts that have construed this provision have permitted the innocent owner defense if the owner can show either his lack of consent or lack of knowledge. Damon G. Saltzburg, Note, *Real Property Forfeitures as a Weapon in the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. REV. 217, 225 (1992); see, e.g., *United States v. 19026 Oakmont S. Drive*, 715 F. Supp. 233, 237 n.3 (N.D. Ind. 1989) (commenting that "an owner who *knows* but does not *consent* to the drug activity" can use innocent ownership defense); *United States v. 171-02 Liberty Ave.*, 710 F. Supp. 46, 50 (E.D.N.Y. 1989) (declaring for first time that claimant may use innocent owner defense by showing either that he had not consented to illegal use of his property or that he lacked knowledge of such use). In addition, prior to *United States v. 92 Buena Vista Avenue*, claimants had to show that they were bona fide purchasers for value who received their interests before the activities giving rise to the forfeiture action occurred. *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126, 1134 (1993).

81. See, e.g., *United States v. 2525 Leroy Lane*, 910 F.2d 343, 352 (6th Cir. 1990) (ordering that spouse must forfeit tenancy-by-entirety interest because husband purchased interest with narcotics proceeds), *cert. denied*, 499 U.S. 947 (1991); *Monroe Sav. Bank v. Catalano*, 733 F. Supp. 595, 600 (W.D.N.Y. 1990) (allowing government to seize real property in which mortgagee attempted to protect mortgage rights); *United States v. 708-710 W. 9th St.*, 715 F. Supp. 1323, 1327 (W.D. Pa. 1989) (granting innocent mortgagee post-seizure interest and unpaid balance at time of default); see also Damon G. Saltzburg, Note, *Real Property Forfeitures as a Weapon in the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. REV. 217, 228 (1992) (specifying that loss of property interest by innocent commercial lenders is biggest problem with real property forfeiture).

82. See, e.g., *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 690 (1974) (requiring forfeiture of yacht although lessee had no knowledge that lessors had illegal drugs on boat); *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 238 (1844) (demanding forfeiture of ship although owner's innocence was "fully established"); *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14-15 (1827) (rejecting piracy conviction as prerequisite to forfeiture of ship); *United States v. One 1957 Rockwell Aero Commander 680 Aircraft*, 671 F.2d 414, 418 (10th Cir. 1982) (requiring forfeiture of airplane, although owner had no knowledge of illegal use, because owner failed to establish due care in entrusting property to another). See generally Mark A. Jankowski, Note, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165, 196 (1990) (suggesting that courts should protect innocent owners by broadly interpreting word "owner"); Damon G. Saltzburg, Note, *Real Property Forfeitures as a Weapon in the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. REV. 217, 226 (1992) (inferring that Congress has power to provide greater protections for innocent owners than that derived from case law).

loaned children their cars⁸³ are among the innocent who have lost property interests under the strict interpretation of the statute's wording. However, because the property itself is considered guilty, the culpability of the property owner is irrelevant.⁸⁴ As one court noted, "the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense."⁸⁵

83. See, e.g., *One 1957 Oldsmobile Auto.*, 256 F.2d at 932-33 (mandating forfeiture of family car when son transported passenger carrying small amount of marijuana); *United States v. One 1952 Model Ford Sedan Auto.*, 213 F.2d 252, 254 (5th Cir. 1954) (determining that United States government has right to seek forfeiture of automobile containing marijuana, even if owner had no knowledge of illegal drugs in car); cf. *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 508, 513 (1921) (requiring innocent owner of taxicab to forfeit vehicle when driver transported untaxed alcohol in it). See generally Peter A. Winn, *Seizures of Private Property in the War Against Drugs: What Process is Due?*, 41 Sw. L.J. 1111, 1134 (1988) (ascertaining that "[f]ew, if any, limitations exist on the government's power to make seizures under the drug statutes"); Michael Schechter, Note, *Fear and Loathing and the Forfeiture Laws*, 75 CORNELL L. REV. 1151, 1178 (1990) (contending that forfeiture should not lie with vessels carrying small amounts of drugs).

84. See *United States v. Stowell*, 133 U.S. 1, 20 (1890) (inferring guilt of horses used for illegal purposes); *Dobbins's Distillery v. United States*, 96 U.S. 395, 402 (1877) (bringing action against distillery used in violation of alcohol laws); *One Blue 1977 AMC Jeep CJ-5 v. United States*, 783 F.2d 759, 761 (8th Cir. 1986) (initiating in rem forfeiture action against offending vehicle); *United States v. \$12,585 in United States Currency*, 669 F. Supp. 939, 940 (D. Minn. 1987) (demanding forfeiture of money found in sportscoat pocket because money related to narcotics activity), *aff'd in part and rev'd in part sub nom.*, *United States v. 3639 2nd St.*, 869 F.2d 1093 (8th Cir. 1989), *cert. denied*, 498 U.S. 1106 (1991); see also Jack Yoskowitz, Comment, *The War on the Poor: Civil Forfeiture of Public Housing*, 25 COLUM. J.L. & SOC. PROBS. 567, 567 (1992) (arguing for abolition of civil forfeiture because of its use by government to avoid due process requirements necessary for in personam proceedings). See generally Christine Meyer, Comment, *Zero Tolerance for Forfeiture: A Call for Reform of Civil Forfeiture Law*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 853, 866 (1991) (explaining that in rem forfeiture is against thing itself based upon its unlawful use, regardless of the owner's culpability).

85. *Pearson Yacht*, 416 U.S. at 683; see *United States v. One 1972 Chevrolet Blazer*, 563 F.2d 1386, 1388-89 (9th Cir. 1977) (citing numerous cases holding that innocence of owner whose property is subject to forfeiture is irrelevant); *United States v. One 1972 Mercedes-Benz 250*, 545 F.2d 1233, 1236 (9th Cir. 1976) (asserting that "statutory forfeitures are not unconstitutional because they enmesh the property interest of innocents"); see also William P. Nelson, Comment, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309, 1321 (1992) (interpreting innocent owner defense as requiring claimant to prove by preponderance of evidence that activities giving rise to forfeiture action were omitted or committed without willful blindness, consent, or knowledge of owner). See generally Jack Yoskowitz, Comment, *The War on the Poor: Civil Forfeiture of Public Housing*, 25 COLUM. J.L. & SOC. PROBS. 567, 578 (1992) (conceding that courts interpret innocent owner defense in differing ways, leaving precise meaning ambiguous).

IV. CONSTITUTIONAL CONSIDERATIONS AND DEFENSES
PROMULGATED BY RECENT SUPREME COURT DECISIONS

A. *The "Innocent Owner" Defense*

Historically, the only redress for an innocent owner with a right in forfeited property was to petition the United States Attorney General for mitigation or remission.⁸⁶ Although innocent owners could not avert forfeiture of their property, they could request that all or part of the property be returned.⁸⁷ However, in 1978, Congress, taking heed of the United States Supreme Court's recognition in *Calero-Toledo v. Pearson Yacht Leasing Co.*⁸⁸ that innocent interest holders need protection, established an "innocent owner" defense to civil drug forfeiture.⁸⁹ This de-

86. See U.S. DEP'T OF JUSTICE, DRUG AGENT'S GUIDE TO FORFEITURE OF ASSETS 228 (1987) (noting that only United States Attorney General may grant relief from drug-related forfeiture). Remission does not entail a monetary penalty. *Id.* Mitigation is often granted when the remission requirements are not met, but extenuating circumstances justify some form of relief. *Id.*; see also *United States v. One 1970 Buick Riviera*, 463 F.2d 1168, 1170 (5th Cir.) (recognizing that Attorney General's discretion over petitions for remission or mitigation is unreviewable), *cert. denied*, 409 U.S. 980 (1972); *General Fin. Co. v. United States*, 45 F.2d 380, 381 (5th Cir. 1930) (refusing to review adverse decision of petition for mitigation). See generally Patricia M. Canavan, *Civil Forfeiture of Real Property: The Government's Weapon Against Drug Traffickers Injures Innocent Owners*, 10 PACE L. REV. 485, 493-94 (1990) (noting that only remedy for forfeited property owner is to petition Attorney General for remission or mitigation).

87. See U.S. DEP'T OF JUSTICE, DRUG AGENTS' GUIDE TO FORFEITURE OF ASSETS 231-33 (1987) (detailing procedures for filing petition for remission or mitigation). Under the Federal Controlled Substances Act, a petition for remission should be sent to the Administrator of the DEA if the property is valued at \$100,000 or less, or to the United States Attorney General if the property is valued at \$100,000 or more. *Id.* The petitioner has the burden of proving her entitlement to remission. *Id.* at 231-32. Additionally, the petitioner only has 30 days from the date she acquired notice of the seizure to file the petition. *Id.* at 233. In the petition, the claimant must show how the interest was acquired, including the price of the property and when the property was purchased. *Id.* If the property was controlled by someone else who caused the seizure, the claimant must fully explain why the property was under another's control. *Id.*; see also Patricia M. Canavan, Comment, *Civil Forfeiture of Real Property: The Government's Weapon Against Drug Traffickers Injures Innocent Owners*, 10 PACE L. REV. 485, 494 (1990) (explaining that Attorney General has discretion to return property if mitigating circumstances exist).

88. 416 U.S. 663 (1974).

89. Psychotropic Substances Act of 1978, Pub. L. No. 95-633, tit. III, § 301, 92 Stat. 3768, 3777 (codified as amended at 21 U.S.C. § 881(a)(6) (1988)) (providing that "no property shall be forfeited under this paragraph, to the intent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner"); see *Pearson Yacht*, 416 U.S. at 689-90 (noting in dicta that, as concerning innocent owners, "it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive"); see also *United States v. 708-710 W. 9th St.*, 715 F. Supp. 1323, 1327 (W.D. Pa. 1989) (refusing to allow innocent mortgagee usual rights under mortgage after forfeiture proceeding); *United*

fense provides that property shall not be forfeited because of any omission or act committed without the owner's knowledge or consent.⁹⁰

Although the words "without the knowledge or consent" appear to be straightforward, courts have split over the proper interpretation of the defense.⁹¹ The majority of courts have construed the provision to permit the innocent owner defense if the owner can demonstrate either lack of consent or lack of knowledge.⁹² These courts have contended that Con-

States v. 171-02 Liberty Ave., 710 F. Supp. 46, 50 (E.D.N.Y. 1989) (allowing owner to use innocent owner defense by demonstrating either lack of knowledge or lack of consent to illegal property use). See generally Eric G. Zajac, *Tenancies by the Entirety and Federal Civil Forfeiture Under the Crime Abuse Prevention and Control Act: A Clash of Titans*, 54 U. PITT. L. REV. 553, 566-67 (1993) (determining that innocent owner defense causes numerous problems with courts, resulting in unclear precedent); Lalit K. Loomba, Note, *The Innocent Owner Defense to Real Property Forfeiture Under the Comprehensive Crime Control Act of 1984*, 58 FORDHAM L. REV. 471, 490-91 (1989) (writing that innocent owner claims often arise when innocent spouse's home becomes subject to forfeiture because of other spouse's narcotics-related activities).

90. 21 U.S.C. § 881(a)(6) (1988); see *171-02 Liberty Ave.*, 710 F. Supp. at 52 (allowing innocent owner defense because claimant did not consent to illegal use of property); see also Michael Schechter, Note, *Fear and Loathing and the Forfeiture Laws*, 75 CORNELL L. REV. 1151, 1180 (1990) (suggesting expansion of innocent owner defense to permit all owners to recover property when government fails to establish link between property owner and illegal drugs). *Contra* U.S. DEP'T OF JUSTICE, *DRUG AGENTS' GUIDE TO FORFEITURE OF ASSETS* 27 (1987) (emphasizing that, at federal level, neither ignorance nor innocence of owner is defense).

91. Compare *United States v. 141st St. Corp.*, 911 F.2d 870, 878-79 (2d Cir. 1990) (allowing innocent owner defense because claimant showed lack of consent to illegal activity), *cert. denied*, 498 U.S. 1109 (1991) and *United States v. 6109 Grubb Rd.*, 886 F.2d 618, 626 (3d Cir. 1989) (allowing claimant to show innocent ownership by proving either lack of knowledge or lack of consent to illegal use of property) with *United States v. 2901 S.W. 118th Ct.*, 683 F. Supp. 783, 788 (S.D. Fla. 1988) (requiring claimant to demonstrate that he did everything reasonably possible to prevent illegal use of property) and *United States v. 124 E. North Ave.*, 651 F. Supp. 1350, 1357 (N.D. Ill. 1987) (demanding that claimant show both lack of knowledge and lack of consent for innocent owner defense). See generally Eric G. Zajac, *Tenancies by the Entirety and Federal Civil Forfeiture Under the Crime Abuse Prevention and Control Act: A Clash of Titans*, 54 U. PITT. L. REV. 553, 567 (1993) (recognizing that judges differ in interpreting precise meaning of innocent owner defense); Jack Yoskowitz, Comment, *The War on the Poor: Civil Forfeiture of Public Housing*, 25 COLUM. J.L. & SOC. PROBS. 567, 578-80 (1992) (determining that innocent owner defense is interpreted differently by courts in various jurisdictions).

92. See, e.g., *141st St. Corp.*, 911 F.2d at 878 (concluding that "a claimant may avoid forfeiture by establishing either that he had no knowledge of the narcotics activity or, if he had knowledge, that he did not consent to it"); *6109 Grubb Rd.*, 886 F.2d at 626 (suggesting owner can show either lack of knowledge or lack of consent to invoke innocent owner defense); *United States v. 19026 Oakmont S. Drive*, 715 F. Supp. 233, 237 n.3 (N.D. Ind. 1989) (suggesting that claimant who has knowledge of illegal activity, but does not consent to it, may invoke innocent owner defense). See generally Lalit K. Loomba, Note, *The Innocent Owner Defense to Real Property Forfeiture Under the Comprehensive Crime Control Act of 1984*, 58 FORDHAM L. REV. 471, 485 (1989) (contending that courts should disjunc-

gress would not have inserted the word "consent" into the amendment if it intended knowledge alone to justify forfeiture.⁹³ On the other hand, the United States Court of Appeals for the Ninth Circuit has required the claimant to show both lack of consent and lack of knowledge to avoid forfeiture.⁹⁴ The Ninth Circuit has justified this result by asserting that the congressional policies underlying the statute require the owner to dispute both consent and knowledge.⁹⁵

tively construe innocent owner defense and permit property owner to show lack of consent).

93. See, e.g., *6109 Grubb Rd.*, 886 F.2d at 625-26 (illustrating that statutory language ("or consent") allows claimant to show innocent ownership by proving that illegal use of property occurred without personal knowledge or without consent); *United States v. Property of Ponce*, 751 F. Supp. 1436, 1440 (D. Haw. 1990) (demonstrating that requiring owner to disprove both consent and knowledge makes phrase "or consent" superfluous since owner without knowledge cannot consent); *United States v. 418 57th St.*, 737 F. Supp. 749, 751 (E.D.N.Y.) (presuming that if Congress intended claimant to disprove both knowledge and consent, it would have put "and" instead of "or" in statute), *rev'd on other grounds*, 922 F.2d 129 (2d Cir. 1990); see also *141st St. Corp.*, 911 F.2d at 878 (realizing that if only knowledge had to be proved, use of "consent" would be unnecessary). See generally Eric G. Zajac, *Tenancies by the Entirety and Federal Civil Forfeiture Under the Crime Abuse Prevention and Control Act: A Clash of Titans*, 54 U. PITT. L. REV. 553, 567 (1993) (noting that courts which allow either lack of knowledge or lack of consent for innocent owner defense assert that Congress would not have added "consent" to statute had knowledge alone been meant to justify forfeiture).

94. See *United States v. Lot 111-B*, 902 F.2d 1443, 1445 (9th Cir. 1990) (requiring claimant to disprove both lack of knowledge and lack of consent). *But see* Mark A. Jankowski, Note, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165, 184 (1990) (indicating that legislative history suggests that courts should interpret innocent owner defense broadly); Jack Yoskowitz, Comment, *The War on the Poor: Civil Forfeiture of Public Housing*, 25 COLUM. J.L. & SOC. PROBS. 567, 577 (1992) (inferring that courts should allow lack of consent as defense because Congress cannot require innocent owners to assume burden of stopping drug activity on property).

95. See *Lot 111-B*, 902 F.2d at 1445 (concluding that congressional policy would not be furthered if claimants who were aware of illegal activity on property were allowed to avoid forfeiture by using innocent owner defense); Eric G. Zajac, *Tenancies by the Entirety and Federal Civil Forfeiture Under the Crime Abuse Prevention and Control Act: A Clash of Titans*, 54 U. PITT. L. REV. 553, 567 (1993) (finding that Ninth Circuit believes Congress intended for claimants to show both lack of knowledge and lack of consent to use innocent owner defense); see also *6109 Grubb Rd.*, 890 F.2d at 623 (determining that legislative history of innocent owner defense suggests that Congress intended for claimants to negate both knowledge and consent); *2901 S.W. 118th Ct.*, 683 F. Supp. at 787 (examining statutory language of innocent owner defense to find that innocent owners must disprove both knowledge and consent). *But see* Damon G. Saltzburg, Note, *Real Property Forfeitures as a Weapon in the Government's War on Drugs: A Failure to Protect Innocent Ownership Rights*, 72 B.U. L. REV. 217, 242 (1992) (arguing that innocent owners should not be penalized for acts of drug dealers unless owner had knowledge of illegal activity and consented to it).

The most logical interpretation of the Forfeiture Statute's innocent owner provision is to allow the claimant to show either lack of knowledge or lack of consent to the illegal use of the property.⁹⁶ First, by relying on statutory canons of construction, courts should conclude that Congress's use of the word "or" in the statute ("knowledge *or* consent") means that each word must be given its independent and ordinary meaning.⁹⁷ Second, and more importantly, the incorporation of an explicit defense in the statute demonstrates that Congress did not intend to allow innocent owners to lose their property.⁹⁸ Thus, requiring a person to disprove both

96. See, e.g., *United States v. One Datsun 280 ZX*, 644 F. Supp. 1280, 1288 (E.D. Pa. 1986) (allowing owner who loaned car to another to invoke innocent owner defense because owner did not consent to illegal use of property or have duty to take affirmative steps to prevent criminal activity); *United States v. One Homemade Vessel Named Barracuda*, 625 F. Supp. 893, 898 (S.D. Fla. 1986) (denying forfeiture because lessor had no reason to suspect lessees would use boat for illegal activity), *aff'd*, 858 F.2d 643 (11th Cir. 1988). See generally DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES § 4.03, at 87 (1985) (establishing that scope of innocent owner defense is "unambiguously broad and inclusive"); Michael Goldsmith & Mark J. Linderman, *Asset Forfeiture and Third Party Rights: The Need for Further Law Reform*, 1989 DUKE L.J. 1254, 1278 (stressing legislative history suggests that Congress did not intend to limit scope of innocent owner defense).

97. See, e.g., *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (determining that "canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings unless the context dictates otherwise"); *6109 Grubb Rd.*, 886 F.2d at 626 (reading "knowledge or consent" in disjunctive manner and allowing claimant to show either lack of knowledge or lack of consent to illegal use of property); *171-02 Liberty Ave.*, 710 F. Supp. at 50 (reasoning that word "or" in statute requires each word to be given independent meaning); see also *418 57th St.*, 737 F. Supp. at 751 (writing that Congress meant for innocent owners to be able to show innocent owner defense by disproving either knowledge or consent). *Contra* Jack Yoskowitz, Comment, *The War on the Poor: Civil Forfeiture of Public Housing*, 25 COLUM. J.L. & SOC. PROBS. 567, 581 (1992) (explaining that Congress intended for innocent owners to be able to invoke defense only by showing absence of knowledge and consent to criminal activity). See generally Lalit K. Loomba, Note, *The Innocent Owner Defense to Real Property Forfeiture Under the Comprehensive Crime Control Act of 1984*, 58 FORDHAM L. REV. 471, 486 (1989) (favoring broad definition of innocent owner defense because policy considerations recommend disjunctive interpretation of "knowledge or consent").

98. See *141st St. Corp.*, 911 F.2d at 878 (recognizing that Congress inserted express defense in statute to protect innocent owners from losing valuable property rights); *6109 Grubb Rd.*, 886 F.2d at 625 (intimating that explicit defense in forfeiture statute suggests that lawmakers are concerned about innocent owners and asserting that Congress generally does not place language in statute without purpose). Senator John Culver expressed the intent of the provision by stating that "[w]hile this section broadens existing forfeiture law . . . , it specifically safeguards the rights of innocent persons." 124 CONG. REC. 23,056 (1978); see Mark A. Jankowski, Note, *Tempering the Relation-Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165, 169 (1990) (recognizing that as forfeiture power expands, broader innocent owner provisions generally follow); see also DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES

consent and knowledge overlooks Congress's desire to protect innocent owners' property, and, as indicated, makes the words "or consent" superfluous.⁹⁹

The United States Supreme Court has recently expanded the protections provided for innocent owners under the Forfeiture Statute.¹⁰⁰ In *United States v. 92 Buena Vista Avenue*,¹⁰¹ the Court concluded that the protection the provision gives to innocent owners is not confined to bona fide purchasers.¹⁰² In *92 Buena Vista Avenue*, a donor gave money to a woman so that she could purchase a home for herself and her three children.¹⁰³ The Government initiated forfeiture proceedings against the house because there was probable cause to believe that the money used to purchase the home was a proceed of illegal drug trafficking.¹⁰⁴ The Government, relying chiefly on the relation-back doctrine, contended that the money the donor received from a narcotics exchange became

§ 4.03, at 87 (1985) (proposing that Congress intended innocent owner defense to be broadly construed).

99. See *141st St. Corp.*, 911 F.2d at 879 (denying forfeiture and allowing claimant to show either lack of knowledge or lack of consent); *418 57th St.*, 737 F. Supp. at 751 (reading language of statute to determine that Congress would have used "and" instead of "or" in innocent owner defense had intent been to require claimants to show both lack of knowledge and lack of consent); *19026 Oakmont Drive*, 715 F. Supp. at 237 n.3 (determining that lack of consent is enough for innocent owner defense); *171-02 Liberty Ave.*, 710 F. Supp. at 50 (holding that owner with knowledge of illegal property use may still invoke innocent owner defense if lack of consent is shown). *But see 124 E. North Ave.*, 651 F. Supp. at 1357 (ordering that "[w]hen trial on the merits of this case occurs, [claimant] will have an opportunity to prove she had no knowledge of and gave no consent to her husband's alleged unlawful activities") (emphasis added).

100. See *United States v. 92 Buena Vista Ave.*, 113 S. Ct. 1126, 1134 (1993) (mandating that protection provided to innocent owners under Comprehensive Drug Abuse Prevention and Control Act of 1970 extends to owners who received property as gift). Legislative history suggests that Congress intended to defend all innocent owners, including heirs, donees, and others who have not paid consideration for the property. See DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES § 4.03, at 87-88 (1993) (stating that innocent owner defense extends to heirs, donees, and anyone with equitable interest in seized property). However, the DEA does not recognize innocence as a defense to forfeiture. See U.S. DEP'T OF JUSTICE, DRUG AGENTS' GUIDE TO FORFEITURE OF ASSETS 27 (1987) (stating that disproving illegal property use or showing that use of property meets statutory exceptions are only possible defenses to civil forfeiture actions). In fact, the DEA has asserted that "[t]he United States Constitution permits the forfeiture of illegally used property regardless of the innocence or ignorance of its owner." *Id.* (emphasis added).

101. 113 S. Ct. 1126 (1993).

102. See *92 Buena Vista Ave.*, 113 S. Ct. at 1134 (finding that text of statute does not support such limitation).

103. *Id.* at 1130.

104. *Id.*; see *supra* notes 61-66 and accompanying text (detailing probable cause requirement of Forfeiture Statute and comparing civil and criminal probable cause burdens).

government property immediately when the donor received it, and, therefore, the home became government property as soon as the money was used to purchase it.¹⁰⁵ The Court, in rejecting the Government's reasoning, recognized that this interpretation "would effectively eliminate the innocent owner defense in almost every imaginable case in which proceeds could be forfeited."¹⁰⁶

Although the Court failed to address the issue of how "knowledge or consent" should be interpreted, the Court correctly concluded that the innocent owner defense is not limited to bona fide purchasers.¹⁰⁷ The innocent owner defense provides that "no property shall be forfeited . . . , to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner."¹⁰⁸ Had Congress intended the in-

105. *92 Buena Vista Ave.*, 113 S. Ct. at 1131, 1134–35. As noted previously, the relation-back doctrine relies on the fictional notion of guilty property to contend that the property may be seized immediately upon illegal use, with title instantly vesting in the government. See *supra* notes 51–53 and accompanying text (discussing general nature of relation-back doctrine and citing authorities illustrating doctrine's operation).

106. *92 Buena Vista Ave.*, 113 S. Ct. at 1135. The Court recognized that applying the government's extreme view of the relation-back doctrine would cause forfeiture of property acquired by innocent persons who just happened to be paid by illegal proceeds for legal goods and services rendered. *Id.* See generally Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1433 (1993) (concluding that forfeiture laws prevent drug defendants from employing quality defense attorneys because all assets are frozen prior to trial).

107. See *92 Buena Vista Ave.*, 113 S. Ct. at 1137 (failing to announce proper interpretation of "knowledge or consent"); DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES § 4.03, at 88 (1993) (showing that legislative history suggests innocent owner defense was intended to protect donees). Senator John Culver demonstrated that the innocent owner defense was added because of concerns about the breadth of the civil forfeiture statute:

Specifically, it was noted that the original language could have been construed to reach properties traceable to the illegal proceeds but obtained by an *innocent* party without knowledge of the manner in which the proceeds were obtained. The original language is modified in the proposed amendment in order to protect *the individual who obtains ownership of proceeds* with no knowledge of the illegal transaction. 124 CONG. REC. 23,056 (1978) (emphasis added); see U.S. DEP'T OF JUSTICE, DRUG AGENTS' GUIDE TO FORFEITURE OF ASSETS 33 (1987) (suggesting that judges often question whether or not to severely punish innocent property owners). The DEA has described what it calls a "judicial rebellion to forfeiture," asserting that

[i]n spite of the ancient rules, and in spite of the executive branch's pardoning power, there have *always* been judges and juries that refuse to follow the law. Unable to accept the harshness of forfeiting a non-negligent person's property, and unwilling to accept the pardon decisions of the executive branches of government, they have either defied or "bent" the law to prevent forfeiture.

Id.

108. 21 U.S.C. § 881(a)(6) (1988).

nocent owner provision to apply strictly to bona fide purchasers, the word "owner," used three times in the statutory language authorizing the defense, would have been qualified.¹⁰⁹ Furthermore, the common-sense argument that drug dealers will escape the Forfeiture Statute by giving proceeds of drug transactions to innocent friends fails to recognize that Congress did not change the innocent owner defense in the 1984 amendments because it intended the defense to protect all property owners.¹¹⁰ As such, the provision should apply not only to bona fide purchasers, but to all innocent owners, as intended by Congress.¹¹¹

109. See *92 Buena Vista Ave.*, 113 S. Ct. at 1134 (analyzing text of statute to determine that word "owner" is unambiguous and does not lead to conclusion that innocent owner defense is limited to bona fide purchasers); see also *Reiter*, 442 U.S. at 339 (stating that courts, in construing statute, must give effect to every word Congress used); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (noting that courts do not emasculate sections of statutes, but give effect to every clause in legislation); *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1882) (recognizing that "[i]t is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed"). See generally Michael Goldsmith & Mark J. Linderman, *Asset Forfeiture and Third Party Rights: The Need for Further Law Reform*, 1989 DUKE L.J. 1254, 1278 (reasoning that Congress intended broad interpretation of innocent owner defense); Lalit K. Loomba, Note, *The Innocent Owner Defense to Real Property Forfeiture Under the Comprehensive Crime Control Act of 1984*, 58 FORDHAM L. REV. 471, 486 (1987) (suggesting that courts allow claimants to use innocent owner defense in numerous fact situations).

110. Compare *United States v. Miscellaneous Jewelry*, 667 F. Supp. 232, 247 (D. Md. 1987) (requiring forfeiture of property when heirs of drug smuggler received jewelry and real estate prior to drug dealer's death), *aff'd sub nom. In re One 1985 Nissan 300 ZX*, 889 F.2d 1317 (4th Cir. 1989) (en banc) with *United States v. One Parcel of Real Estate Property*, 660 F. Supp. 483, 487 (S.D. Miss.) (mandating forfeiture of property when lessor received title to fishing camp for sole purpose of stopping seizure because property had been used for marijuana smuggling), *aff'd*, 831 F.2d 566 (5th Cir. 1987). See generally Michael Goldsmith & Mark J. Linderman, *Asset Forfeiture and Third Party Rights: The Need for Further Law Reform*, 1989 DUKE L.J. 1254, 1272 (asserting that innocent owner defense resulted from public's outrage over hardships on innocent third parties due to zero-tolerance program); Michael Schechter, Note, *Fear and Loathing and The Forfeiture Laws*, 75 CORNELL L. REV. 1151, 1181 (1990) (arguing that courts create loopholes to avoid forfeiture of property owned by persons not connected with drug offenses).

111. See *92 Buena Vista Ave.*, 113 S. Ct. at 1134 (examining text of statute and concluding that Congress intended innocent owner defense to include all owners, not just bona fide purchasers). Congress directed that, in the innocent owner defense, "[t]he term 'owner' should be broadly interpreted to include any person with a recognizable legal or equitable interest in the property seized." Joint Explanatory Statement of Titles II and III, Psychotropic Substance Act of 1978, Pub. L. No. 95-633, 95th Cong. 2d Sess., reprinted in 1978 U.S.C.C.A.N. 9518, 9522. Senator Sam Nunn inferred that the innocent owner defense should not be limited to bona fide purchasers when he stated that the provision "specifically safeguards the rights of innocent persons." 124 CONG. REC. 23,056 (1978); see DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES § 4.03, at 89 (1985) (advocating protection for all innocent persons who have ownership interests in property);

B. *Eighth Amendment Excessive Fines Clause*

Many claimants and commentators have asserted that civil forfeiture violates Eighth Amendment¹¹² prohibitions against excessive fines and cruel and unusual punishments.¹¹³ Loss of a family car because a passenger possessed drugs,¹¹⁴ forfeiture of a condominium because a small

see also Mark A. Jankowski, Note, *Tempering the Relation—Back Doctrine: A More Reasonable Approach to Civil Forfeiture in Drug Cases*, 76 VA. L. REV. 165, 167 (1990) (demonstrating that Congress tempered goal of crippling economic bases of drug traffickers with desire to prevent innocent owners from losing property). *But cf.* U.S. DEP'T OF JUSTICE, DRUG AGENTS' GUIDE TO FORFEITURE OF ASSETS 32 (1987) (stating that “[t]he traditional view holds that nothing in the federal Constitution, nor in the constitutions of most states, prohibits the forfeiture of property belonging to an innocent, ignorant, non-negligent owner”).

112. U.S. CONST. amend. XIII. The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” *Id.*

113. *See, e.g.*, Christine Meyer, Comment, *Zero Tolerance for Forfeiture: A Call for Reform of Civil Forfeiture Law*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 853, 859 (1991) (arguing that civil forfeiture often results in penalty disproportionate to offense committed, thereby violating Eighth Amendment's Excessive Fines Clause); David J. Stone, Note, *The Opportunity of Austin v. United States: Toward a Functional Approach to Civil Forfeiture and the Eighth Amendment*, 73 B.U. L. REV. 427, 447 (1993) (proposing ways in which Eighth Amendment may be applied to civil forfeiture); Jack Yoskowitz, Comment, *The War on the Poor: Civil Forfeiture of Public Housing*, 25 COLUM. J.L. & SOC. PROBS. 567, 591–92 (1992) (showing that many claimants believe forfeiture of extensive property for minor drug violations constitutes violation of Excessive Fines Clause). *But see* United States v. 3639 2nd St., 869 F.2d 1093, 1096 (8th Cir. 1989) (rejecting Eighth Amendment defense and finding proportionality between value of forfeitable property and severity of injury inflicted by its use to be irrelevant), *cert. denied*, 498 U.S. 1106 (1991). One commentator has suggested that, for purposes of forfeiture, the Excessive Fines Clause should be read as the “civil arm” of the Eighth Amendment. David J. Stone, Note, *The Opportunity of Austin v. United States: Toward a Functional Approach to Civil Forfeiture and the Eighth Amendment*, 73 B.U. L. REV. 427, 447 (1993). Under this view, the characterization of a forfeiture action as civil or criminal would be irrelevant because any money or property forfeited to the government would be subjected to proportionality review under the Excessive Fines Clause. *Id.*; *see* James B. Speta, Note, *Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment*, 89 MICH. L. REV. 165, 196 (1990) (asserting that scope of Forfeiture Statute may be narrowed by applying Eighth Amendment proportionality review to civil forfeiture actions).

114. *See* United States v. One 1957 Oldsmobile Auto., 256 F.2d 931, 933–34 (5th Cir. 1958) (reversing district court decision and remanding to require forfeiture of woman's car because son's passenger was found in possession of marijuana). Although the trial court compassionately held that it would be “unconscionable” and “very wrong to take this car away from this old woman (the driver's mother) and this young man who are trying to pay it out,” the Fifth Circuit Court of Appeals reversed the trial court's decision, rejecting the innocence of the owner as a defense to forfeiture. *Id.* at 932-33.

amount of cocaine was found on the premises,¹¹⁵ and seizure of a yacht because, unknown to the lessor, the lessee possessed one marijuana cigarette¹¹⁶ each constitute circumstances under which forfeiture would appear to be a punishment disproportionate to the crime.¹¹⁷

Despite these and numerous other examples, the Eighth Amendment was not applied to civil forfeiture actions until the United States Supreme Court's recent decision in *Austin v. United States*.¹¹⁸ In *Austin*, the Government sought forfeiture of Richard Austin's auto body shop and mobile home after he pleaded guilty to possession of cocaine with intent to dis-

115. See *United States v. 38 Whalers Cove Drive*, 747 F. Supp. 173, 181 (E.D.N.Y. 1990) (stating that "[f]orfeiture of [the owner's] approximately \$70,000 interest in the condominium does not seem a grossly excessive amount for his share of the costs of remedying the ills occasioned by drugs"), *aff'd*, 954 F.2d 29 (2d Cir.), *cert. denied*, 113 S. Ct. 55 (1992). The owner of the condominium was not imprisoned for drug violations, but pleaded guilty to one count of *attempted* sale of a controlled substance. *Id.* at 175. The court noted that "[f]orfeiture in this case may produce a harsh result, rendering homeless a man whom the state court declined to incarcerate. But that is what section 881(a)(7) contemplated." *Id.* at 176.

116. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 690 (1974) (requiring forfeiture of yacht because lessor did not prove that it did everything reasonably possible to prevent property from being put to unlawful use). *Pearson Yacht Leasing Company* leased a yacht to two Puerto Rico residents. *Id.* at 665. Puerto Rican authorities searched the vessel and found one marijuana cigarette. *Id.* at 693. Two months after the marijuana was found, law enforcement authorities seized the vessel pursuant to a Puerto Rican statute which provided that vessels used to transport controlled substances were subject to forfeiture. *Id.* at 665-66. When the lessors did not challenge the seizure within 15 days after notice was given, the yacht was forfeited. *Id.* at 668.

117. See *United States v. 4492 S. Livonia Rd.*, 889 F.2d 1258, 1270 (2d Cir. 1989) (criticizing disproportionate punishment and noting that Constitution should mandate many more protections for civil forfeiture); *United States v. 3639 2nd St.*, 869 F.2d 1093, 1098 (8th Cir. 1989) (recognizing that forfeiture statutes may be so "draconian" as to violate Eighth Amendment's Excessive Fines Clause), *cert. denied*, 498 U.S. 1126 (1991); see also Christine Meyer, Comment, *Zero Tolerance for Forfeiture: A Call for Reform of Civil Forfeiture Law*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 853, 879 (1991) (asserting that civil forfeiture results in sanctions which are disproportionate to crime committed); James B. Speta, Note, *Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment*, 89 MICH. L. REV. 165, 202 (1990) (demanding that civil forfeiture actions receive proportionality review to protect claimants' constitutional rights). See generally Michael Schechter, Note, *Fear and Loathing and the Forfeiture Laws*, 75 CORNELL L. REV. 1151, 1177-78 (1990) (suggesting that courts strike down disproportionate applications of civil forfeiture statute because of Eighth Amendment violations).

118. 113 S. Ct. 2801 (1993).

tribute.¹¹⁹ Austin defended by asserting that the Eighth Amendment's Excessive Fines Clause applies to civil forfeiture actions.¹²⁰

The Court, in addressing this contention, recognized that before the Eighth Amendment can be applied to civil forfeiture actions, forfeiture must be recognized as punishment.¹²¹ After a thorough analysis of common-law forfeiture, the Court determined that because the Forfeiture Statute relates strictly to drug law violations and focuses on the owner's guilt by providing innocent owner defenses, forfeiture under the statute constitutes punishment.¹²² The Court then held that the Excessive Fines Clause applies to civil forfeiture actions.¹²³

Although the *Austin* decision provides important constitutional safeguards to property owners, the Court should have provided additional protections against forfeiture abuses by applying the proportionality doctrine found in the Eighth Amendment's Cruel and Unusual Punishments Clause.¹²⁴ This clause "prohibits not only barbaric punishments, but also

119. *Austin*, 113 S. Ct. at 2803. Richard Austin sold two grams of cocaine from his auto body shop to an informant. *Id.* The next day, law enforcement personnel searched the property and discovered small quantities of marijuana and cocaine. *Id.*

120. *Id.* at 2804; see *Boyd v. United States*, 116 U.S. 616, 638 (1886) (implying that constitutional protections are applicable to forfeiture). *But see United States v. Santoro*, 866 F.2d 1538, 1544 (4th Cir. 1989) (rejecting proportionality challenge under Eighth Amendment to civil forfeiture of residence), *cert. denied*, 498 U.S. 1126 (1991).

121. *Austin*, 113 S. Ct. at 2805-06; see *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 511 (1921) (recognizing that forfeiture is firmly fixed in punitive jurisprudence of United States); *Peisch v. Ware*, 8 U.S. (4 Cranch) 347, 364 (1808) (asserting that forfeiture of goods is punishment).

122. *Austin*, 113 S. Ct. at 2812. The Court noted that innocence of the owner had previously been rejected as a defense under two theories. *Id.* at 2808. The first theory relied on the fiction that the property is guilty of the offense. *Id.* The second theory justified forfeiture on the basis that owners should be held accountable for the mistakes of those they have entrusted with their property. *Id.*; see *Goldsmith-Grant Co.*, 254 U.S. at 511 (applying first theory in stating "that the thing is primarily considered the offender"); *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827) (stating that "the offence is attached primarily to the thing"); see also *Dobbins's Distillery v. United States*, 96 U.S. 395, 404 (1877) (applying second theory in noting that "the unlawful acts of the distiller bind the owner of the property, in respect to the management of the same, as much as if they were committed by the owner himself"); *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 234 (1844) (reasoning that "the acts of the master and crew, in cases of this sort, bind the interest of the owner of the ship, whether he be innocent or guilty").

123. *Austin*, 113 S. Ct. at 2812. The Court concluded that civil forfeiture constitutes "payment to a sovereign as punishment for some offense." *Id.* (quoting *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 265 (1989)).

124. See *38 Whalers Cove Drive*, 954 F.2d at 37 (illustrating that when value of property is disproportionate to value of drug involved in violation, rebuttable presumption arises that forfeiture is punitive). *But see United States v. 1985 BMW 635 CSI*, 677 F. Supp. 1039, 1041 (C.D. Cal. 1987) (rejecting claimant's argument that forfeiture violates Eighth Amendment prohibition against cruel and unusual punishment). See generally

sentences that are disproportionate to the crime committed."¹²⁵ In *Solem v. Helm*,¹²⁶ the Court listed the following criteria as guidance for Eighth Amendment proportionality analysis: "(1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for the commission of the same crime in other jurisdictions."¹²⁷ Application of the *Helm* factors to civil forfeiture would avoid constitutional problems by ensuring that punishment is tailored on a case-by-case basis.¹²⁸ Addi-

Christine Meyer, Comment, *Zero Tolerance for Forfeiture: A Call For Reform of Civil Forfeiture Law*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 853, 881 (1991) (indicating that main problem with civil forfeiture law concerns forfeiture of property that is vastly disproportionate to offense committed); James B. Speta, Note, *Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment*, 89 MICH. L. REV. 165, 202 (1990) (demanding that forfeiture under Forfeiture Statute receive full proportionality review); David J. Stone, Note, *The Opportunity of Austin v. United States: Toward a Functional Approach to Civil Forfeiture and the Eighth Amendment*, 73 B.U. L. REV. 427, 448 (1993) (suggesting that all forfeiture to government should be subject to proportionality review); Jack Yoskowitz, Comment, *The War on the Poor: Civil Forfeiture of Public Housing*, 25 COLUM. J.L. & SOC. PROBS. 567, 591 (1992) (noting general failure of proportionality challenges to civil forfeiture).

125. *Solem v. Helm*, 463 U.S. 277, 284 (1983); see *Edmund v. Florida*, 458 U.S. 782, 801 (1982) (finding death penalty excessive in case in which defendant was convicted under felony-murder rule because defendant did not intend to use lethal force); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (emphasizing that "sentence of death is grossly disproportionate and excessive punishment for the crime of rape"); *Weems v. United States*, 217 U.S. 349, 372 (1910) (endorsing principle of proportionality in overturning sentence of 15 years of hard labor for falsifying public document); 1 WILLIAM BLACKSTONE, COMMENTARIES *16-17 (stating that "cruel punishments of unreasonable severity" should be condemned rather than condoned). See generally David J. Stone, Note, *The Opportunity of Austin v. United States: Toward a Functional Approach to Civil Forfeiture and the Eighth Amendment*, 73 B.U. L. REV. 427, 446 (1993) (enumerating difficulties in transposing Cruel and Unusual Punishments Clause jurisprudence to civil forfeiture).

126. 463 U.S. 277 (1983).

127. *Helm*, 463 U.S. at 292. The Court applied these criteria to determine that *Helm's* sentence of life imprisonment for six nonviolent felonies was disproportionate to his crime. *Id.* at 303.

128. See Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889, 905 (1987) (stating that "[a]t a bare minimum, *Helm* establishes that Congress is not free to impose whatever penalty it chooses on drug offenders"); James B. Speta, Note, *Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment*, 89 MICH. L. REV. 165, 203 (1990) (contending that application of *Helm* criteria to civil forfeiture will protect against constitutional infirmities); see also *United States v. Frazier*, 981 F.2d 92, 95-96 (3d Cir. 1992) (rejecting defendant's claim under *Helm* that penalty for cocaine possession constitutes cruel and unusual punishment), *cert. denied*, 113 S. Ct. 1661 (1993); *United States v. Doucette*, 979 F.2d 1042, 1048 (5th Cir. 1992) (applying objective criteria test of *Helm* to determine sentence was not unreasonable); *United States v. Harris*, 903 F.2d 770, 778 (10th Cir. 1990) (finding forfeiture of money for marijuana possession reasonable under criteria set forth in

tionally, because forfeiture will be deemed excessive only in a limited number of cases, the Forfeiture Statute will continue to further its purpose—to cripple the economic bases of drug traffickers.¹²⁹ Assets gained from the profits of illegal drug dealing will unquestionably remain subject to forfeiture.¹³⁰ Furthermore, the use of judicial presumptions could prevent large-scale drug dealers from retaining property when forfeiture is sought under the statute.¹³¹ One such presumption is the commonly used

Helm); *United States v. Busher*, 817 F.2d 1409, 1415 (9th Cir. 1987) (applying objective criteria of *Helm* to forfeiture under Racketeer Influenced and Corrupt Organizations Act).

129. See James B. Speta, Note, *Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment*, 89 MICH. L. REV. 165, 202 (1990) (suggesting that judicial balancing test will protect persons in civil forfeiture actions while maintaining forfeiture as weapon against drug dealers); David J. Stone, Note, *The Opportunity of Austin v. United States: Toward a Functional Approach to Civil Forfeiture and the Eighth Amendment*, 73 B.U. L. REV. 427, 449 (1993) (explaining that application of Eighth Amendment to civil forfeiture will protect claimant's rights while preserving legitimate role of forfeiture—attacking large criminal enterprises); see also *supra* notes 40-41, 68 and accompanying text (documenting congressional intent underlying enactment of Forfeiture Statute).

130. See Christine Meyer, Comment, *Zero Tolerance For Forfeiture: A Call for Reform of Civil Forfeiture Law*, 5 NOTRE DAME J.L. & PUB. POL'Y 853, 884-85 (1991) (contending that forfeiture should be aggressive weapon against drug peddlers, but that it serves no compelling interest when employed against personal users). Civil forfeiture will not be excessive in cases involving large-scale narcotics trafficking. James B. Speta, Note, *Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment*, 89 MICH. L. REV. 165, 206 (1990). Instead, the three-part *Helm* analysis merely requires the tailoring of a penalty to individual-use cases. *Id.* The determination of what is "excessive" will depend on the facts and circumstances of the particular case. *Id.* But see David J. Stone, Note, *The Opportunity of Austin v. United States: Toward a Functional Approach to Civil Forfeiture and the Eighth Amendment*, 73 B.U. L. REV. 427, 448 (1993) (suggesting that traditional civil-criminal distinction in Eighth Amendment jurisprudence should not be disturbed). See generally William P. Nelson, Comment, *Should the Ranch Go Free Because the Constable Blundered? Gaining Compliance with Search and Seizure Standards in the Age of Asset Forfeiture*, 80 CAL. L. REV. 1309, 1315-17 (1992) (stating that broad sweep of Forfeiture Statute has allowed law enforcement personnel to seize property which Congress did not intend to be subjected to forfeiture).

131. See, e.g., *United States v. Parcels of Land*, 903 F.2d 36, 40 (1st Cir. 1990) (using presumption in stating that "[t]he sheer magnitude of [claimant's] expenditures supports an inference that his property acquisitions were funded with the proceeds of drug trafficking"); *United States v. \$250,000 in United States Currency*, 808 F.2d 895, 899 (1st Cir. 1987) (utilizing presumption because claimant had no source of income); *United States v. \$2,500 in United States Currency*, 689 F.2d 10, 16 (2d Cir. 1982) (noting that claimant did not have legitimate source of income which could prove property subject to forfeiture was lawfully purchased), *cert. denied*, 465 U.S. 1099 (1984); see also *United States v. \$364,960 in United States Currency*, 661 F.2d 319, 324 (5th Cir. 1981) (determining that large amount of money supports inference that funds are drug proceeds). See generally James B. Speta, Note, *Narrowing the Scope of Civil Drug Forfeiture: Section 881, Substantial Connection and the Eighth Amendment*, 89 MICH. L. REV. 165, 209 (1990) (reporting that drug traffick-

theory that automobiles owned by drug dealers who have no other apparent means of support were purchased with profits from illegal activities.¹³² Thus, even if the property was lawfully purchased, the court, after a proportionality analysis, will retain the discretion to find that forfeiture constitutes an appropriate sanction.¹³³

C. Fifth Amendment Due Process Clause

Another constitutional defense to civil forfeiture is contained in the Fifth Amendment, which forbids the deprivation of property or liberty without adequate procedural protections or due process necessary to reduce the chance that the interest in question will be wrongfully taken.¹³⁴

ers will not escape forfeiture, even under Excessive Fines Clause analysis, if courts properly use presumptions).

132. See *United States v. \$33,000 United States Currency*, 640 F. Supp. 898, 900 (D. Md. 1986) (using presumptions to subject property to forfeiture). In *\$33,000 United States Currency*, the claimant contended that the seized money constituted proceeds from the sale of stocks, coins, and a horse. *Id.* at 899-900. The court, however, determined that the horse was bought at a time when the owner had no means of support. *Id.* The court found that the horse and the proceeds from it were drug profits and were therefore subject to forfeiture. *Id.*; see *Parcels of Land*, 903 F.2d at 40 (requiring forfeiture of property by using presumptions when claimant had no legitimate source of income, purchased items worth millions of dollars, and reported his average annual income to be \$27,690); see also *United States v. One 1986 Nissan Maxima GL*, 895 F.2d 1063, 1065 (5th Cir. 1990) (subjecting automobile purchased with cash to forfeiture because person had no legitimate source of income); cf. *United States v. All Funds & Other Property Contained In Account Number 031-217362*, 661 F. Supp. 697, 701 (S.D.N.Y. 1986) (stating that once money in account is deemed tainted, claimant bears burden of showing its legitimacy).

133. See *Doucette*, 979 F.2d at 1048 (applying proportionality analysis and *Helm* test to determine sentence was not disproportionate to crime committed); *Harris*, 903 F.2d at 778 (determining that forfeiture of large amount of money for possession of relatively small amount of marijuana was not disproportionate). But see *Busher*, 817 F.2d at 1416 (remanding case to determine whether forfeiture was so disproportionate to crime committed that Eighth Amendment was violated). See generally Christine Meyer, Comment, *Zero Tolerance for Forfeiture: A Call for Reform of Civil Forfeiture Law*, 5 NOTRE DAME J.L. ETHICS & PUB. POL'Y 853, 879 (1991) (asserting that many courts hold that seizure of property is not "harsh enough" to require Eighth Amendment scrutiny); Jack Yoskowitz, Comment, *The War on the Poor: Civil Forfeiture of Public Housing*, 25 COLUM. J.L. & SOC. PROBS. 567, 589 (1992) (concluding that courts generally rule in favor of government when proportionality is defense to civil forfeiture).

134. See U.S. CONST. amend. V (providing, in pertinent part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . ."); see also *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) (holding that administrative procedures under Social Security Act comport with due process); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (explaining that "due process is flexible and calls for such procedural protections as the particular situation demands"); *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (noting that due process requires opportunity to be heard "at a meaningful time and in a meaningful manner"); *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961) (stating that

Before claiming the procedural safeguards found in the Fifth Amendment's Due Process Clause, one must show that government action jeopardizes an interest specifically recognizable as "property" or "liberty."¹³⁵ Therefore, the first question concerning the seizure of real property without notice and a hearing is whether the action threatens a liberty or property interest.¹³⁶ The Supreme Court recently addressed this issue in *United States v. James Daniel Good Real Property*¹³⁷ and found that, absent exigent circumstances, the Due Process Clause requires the government to provide notice and an opportunity to be heard before real property subject to civil forfeiture may be seized.¹³⁸ In reaching this decision, the Court recognized that ex parte pre-seizure proceedings give little protection to innocent owners because even if the court finds the claim-

"[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances"); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) (declaring that "[t]he fundamental requisite of due process of law is the opportunity to be heard").

135. See Henry P. Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405, 411 (1977) (noting that before Civil War, due process "liberty" only meant freedom from personal restraint); Glen J. Hettinger, Note, *Due Process in Preliminary Proceedings Under RICO and CCE*, 83 COLUM. L. REV. 2068, 2073-74 (1983) (asserting that one must show government action threatens property or liberty interest before seeking protection of Due Process Clause). The United States Supreme Court has established a two-step process to be used for evaluating due process claims. See *Morrissey*, 408 U.S. at 481 (determining whether due process requirements apply to parole revocations). First, the court must decide whether a protected interest is at stake. *Id.* Second, the court must determine what process is necessary to protect that interest. *Id.* See generally *Board of Regents v. Roth*, 408 U.S. 564, 578 (1972) (finding that dismissal of professor without hearing or notice did not violate Due Process Clause because no property or liberty interest was at stake); *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972) (stating that although severity of deprivation is another factor to consider in determining appropriate form of hearing, it is not determinative of basic right to some type of prior hearing).

136. See, e.g., *Morrissey*, 408 U.S. at 481 (explaining that first question for due process analysis is whether interest claimed to be protected is liberty or property); *Bell v. Burson*, 402 U.S. 535, 542 (1971) (requiring government to hold hearing before terminating driver's license because liberty interest was involved); *Goldberg v. Kelly*, 397 U.S. 254, 270-71 (1970) (finding that welfare payments are liberty interests which require government to grant affected person hearing before terminating payment); see also *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) (recognizing that extent to which due process must be given to recipient is influenced by chance he may be "condemned to suffer grievous loss"); JOHN E. NOWAK ET AL., *CONSTITUTIONAL LAW* 530 (2d ed. 1983) (illustrating that state may deny privilege to individual without hearing unless life, liberty, or property interest is at stake); Peter A. Winn, *Seizures of Private Property in the War Against Drugs: What Process In Due?*, 41 Sw. L.J. 1111, 1134 (1988) (indicating that pre-seizure judicial review is necessary for civil forfeiture to comport with Due Process Clause).

137. 114 S. Ct. 492 (1993).

138. *James Daniel Good Real Property*, 114 S. Ct. at 505.

ant to be an innocent owner, this determination, made months after the seizure has taken place, "would not cure the temporary deprivation that an earlier hearing might have prevented."¹³⁹

An analysis of the burdens imposed on claimants without a preseizure hearing and the burdens imposed on the government in providing a preseizure hearing suggests that the Court reached the correct decision in *James Daniel Good Real Property*.¹⁴⁰ A seizure without prior notice and a hearing deprives the owner of valuable property rights, including the right to use and enjoyment, the right of occupancy, the right to charge rents, and the right of sale.¹⁴¹ Furthermore, because of congested civil dockets, an owner may not receive a hearing to reinstate these rights for

139. *Id.* at 502 (quoting *Connecticut v. Doehr*, 501 U.S. 1, 15 (1991)); see *Fuentes*, 407 U.S. at 80–81 (suggesting that purpose of prior notice and hearing is to protect use of property from unselective encroachment); *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (noting that exceptions to predeprivation notice and hearing are allowed only in "extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event"). See generally Glen J. Hettinger, Note, *Due Process in Preliminary Proceedings Under RICO and CCE*, 83 COLUM. L. REV. 2068, 2075 (1983) (construing prior Court decisions defining "property" and determining that seizure of property without hearing violates Fifth Amendment).

140. See *James Daniel Good Real Property*, 114 S. Ct. at 502 (analyzing burdens on government in granting preseizure hearing). The Court has indicated that identification of specific due process requirements necessitates consideration of three factors: (1) the private interest which will be affected by the action; (2) the chance of an erroneous deprivation of a private interest through the procedures used; and (3) the probative value of substitute or additional procedural safeguards. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). When courts issue orders allowing for seizure without a hearing, private parties often have their assets frozen without even having been heard. See generally Paul Finkelman, *The Second Casualty of War: Civil Liberties and the War on Drugs*, 66 S. CAL. L. REV. 1389, 1433 (1993) (asserting that pretrial freezing of assets in civil forfeiture actions violates individual due process rights).

141. See *James Daniel Good Real Property*, 114 S. Ct. at 501 (depicting numerous property rights claimant was deprived of by seizure without hearing); see also *United States v. Karo*, 468 U.S. 705, 714 (1984) (recognizing that "private residences are places in which the individual normally expects privacy free of governmental intrusion"); *Silverman v. United States*, 365 U.S. 505, 511 (1961) (noting that "[a]t the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion"); JOHN E. NOWAK ET AL., *CONSTITUTIONAL LAW* 546 (2d ed. 1983) (tracing historical notions of property as pertaining to due process considerations); cf. *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 339 (1969) (holding that deprivation of enjoyment of employment wages without hearing violates due process).

many months.¹⁴² These deprivations of property rights can cause substantial and undeserved economic harm to property owners.¹⁴³

In contrast, the requirement of a preseizure hearing obligates the government to assume few additional tasks.¹⁴⁴ Instead of participating in a postseizure hearing, the government must simply participate in the hearing prior to the seizure.¹⁴⁵ Because the preseizure hearing is only re-

142. See *James Daniel Good Real Property*, 114 S. Ct. at 502 (showing that claimants are often deprived of property use for long periods of time because federal court system is overworked); see also Jason M. Halpen, Comment, *Harris v. Reed: A New Look at Federal Habeas Jurisdiction Over State Petitioners*, 58 *FORDHAM L. REV.* 493, 507 (1989) (asserting that federal judiciary is overburdened); Stewart Jay, *The World According to Judge Posner*, 73 *GEO. L.J.* 1507, 1520 (1985) (determining that congested federal dockets lead to delays in litigation of cases (reviewing RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985))). The consensus is that the federal courts are being worked at near, or in some cases beyond, capacity. *Id.* The time a judge spends on a case is prioritized by the importance of the case. *Id.*

143. See *James Daniel Good Real Property*, 114 S. Ct. at 501 (noting that claimant's right to control home is important historical interest); see also *Goss v. Lopez*, 419 U.S. 565, 576 (1975) (writing that harshness of property deprivation is not decisive of fundamental right to due process protection). *But see* *DiGiacomo v. United States*, 346 F. Supp. 1009, 1011 (D. Del. 1972) (finding that in rem forfeiture does not violate Due Process Clause because of continuing belief in guilty property). The seizure of a house constitutes a far greater deprivation than attachment or the loss of furniture. *James Daniel Good Real Property*, 114 S. Ct. at 501. However, the Supreme Court has held that the taking of household furniture and kitchen appliances is consequential enough to require a predeprivation hearing. See *Fuentes*, 407 U.S. at 97 (explaining what is necessary to comport with due process requirements concerning property interests). Furthermore, in *Connecticut v. Doehr*, the Court invalidated a state statute because it authorized prejudgment real estate attachment without a prior hearing. See *Doehr*, 501 U.S. at 14–15 (balancing difficulties imposed on government by requiring prejudgment hearing with due process protection of property).

144. See *James Daniel Good Real Property*, 114 S. Ct. at 504 (finding that hearing before seizure creates no significant administrative burden). From an administrative standpoint, there is no difference whether the hearing is conducted before or after seizure. *Id.* Any harm caused by delaying the hearing is minimal compared to injuries caused by erroneous seizures. *Id.*; see also Peter A. Winn, *Seizures of Private Property in the War on Drugs: What Process is Due?*, 41 *Sw. L.J.* 1111, 1134 (1988) (stating that preseizure judicial review “would place a minimal burden on law enforcement officers, provide an important safeguard against erroneous deprivations of property, and meet the constitutionally required constraint on what is otherwise the unrestricted power under the ancient name of forfeiture”). *Contra* Glen J. Hettinger, Note, *Due Process in Preliminary Proceedings Under RICO and CCE*, 83 *COLUM. L. REV.* 2068, 2070–71 (1983) (stating that requiring full-scale hearing would impose debilitating burden on prosecutorial resources of government).

145. See *James Daniel Good Real Property*, 114 S. Ct. at 504 (asserting that preseizure hearing does not require extra proceeding because there will no longer be postseizure hearing); see also *United States v. \$8,850 in United States Currency*, 461 U.S. 555, 564–65 (1983) (determining whether 18-month delay violated due process guarantee to be heard at meaningful time); *Boddie*, 401 U.S. at 378 (asserting that notice and hearing are generally

quired for real property, which cannot be removed or concealed, there is no threat that the court will lose jurisdiction over the property.¹⁴⁶ Finally, the government's interests at the beginning of the forfeiture action—to prevent the property from being sold, destroyed, concealed, or used for additional illegal activity—will continue to be served without seizing the property.¹⁴⁷

V. CONCLUSION

Civil drug forfeiture is an important weapon in the war on drugs. However, the broad language of the Forfeiture Statute, coupled with the zealotry of the drug war, erodes important constitutional guarantees. This Comment does not propose an overhaul of the statute, but asserts that additional defenses are necessary to ensure that the statute complies with the Constitution.

required before property seizure). See generally *Fuentes*, 407 U.S. at 81 (suggesting purpose of prior notice and hearing is “to minimize substantively unfair or mistaken deprivations of property”); Peter A. Winn, *Seizures of Private Property in the War on Drugs: What Process Is Due?*, 41 Sw. L.J. 1111, 1134 (1988) (suggesting that pre-seizure hearing is necessary because government possesses limitless power in forfeiture actions).

146. See *James Daniel Good Real Property*, 114 S. Ct. at 502–03 (asserting that real property, unlike yacht or automobile, cannot be moved to prevent forfeiture); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974) (allowing forfeiture of vessel because yacht could be moved to another area to prevent court from exercising jurisdiction); see also *Mathews*, 424 U.S. at 333–34 (discussing whether due process mandates evidentiary hearing before one is deprived of property interests); cf. *Commissioner v. Shapiro*, 424 U.S. 614, 630 n.12 (1976) (suggesting that government's interest in protecting revenue is sufficient to allow imposition of tax liens before hearing); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 608–09 (1974) (recognizing that seller's default is enough to justify prehearing sequestration of merchandise to protect against transfer, concealment, or damage). See generally Glen J. Hettinger, Note, *Due Process in Preliminary Proceeding Under RICO and CCE*, 83 COLUM. L. REV. 2068, 2075 (1983) (noting that Court recognizes property use as important property interest).

147. See *James Daniel Good Real Property*, 114 S. Ct. at 504 (stating that harm to government caused by delay before forfeiture is minimal); Peter A. Winn, *Seizures of Private Property in the War on Drugs: What Process is Due?*, 41 Sw. L.J. 1111, 1134 (1988) (stating that governmental interests in forfeiture action would not be injured by pre-seizure judicial review); see also *Bell*, 402 U.S. at 540–41 (noting that additional expense caused by more extensive hearing is not sufficient to deny due process); *Boddie*, 401 U.S. at 379 (declaring that only “extraordinary situations” involving “valid governmental interest” justify postponing hearing). One commentator has asserted that “[t]he required degree of procedural safeguards varies directly with the importance of the private interest affected and the need for and usefulness of the particular safeguard in the given circumstances and inversely with the burden and any other adverse consequences of affording it.” See Henry J. Friendly, “*Some Kind of Hearing*,” 123 U. PA. L. REV. 1267, 1278 (1975) (balancing governmental interests in public actions with private individuals' due process rights).

Courts and legislatures, as an important first step in modernizing forfeiture law, should recognize that the notion of guilty property, traceable to the Bible and early common law, is merely a fiction which should be discarded. Instead of relying on this fiction, courts should focus on the guilt or innocence of the accused party. Additionally, courts should adhere strictly to the congressional intent of the Forfeiture Statute, which is not to punish all drug users, but to cripple the economic bases of drug traffickers.

The United States Supreme Court recently announced important new defenses to civil drug forfeiture. The recognition of these additional defenses is necessary to ensure that innocent owners are not deprived of important property rights. In *United States v. 92 Buena Vista Avenue*,¹⁴⁸ the Court correctly concluded that the innocent owner defense extends beyond bona fide purchasers. Although this recognition increases protection for innocent owners, courts throughout the nation should provide additional safeguards by allowing claimants to show either lack of knowledge of or lack of consent to the illegal use of their property. Additionally, by asserting in *Austin v. United States*¹⁴⁹ that the Eighth Amendment's Excessive Fines Clause applies to civil forfeiture actions, the Court took important steps to ensure that forfeiture of large amounts of property will not ensue from minor drug violations. Courts should extend the holding in *Austin* and apply the proportionality doctrine from *Solem v. Helm*¹⁵⁰ to guarantee that the appropriate punishment will be tailored to the offense committed. Finally, the Court's recognition in *United States v. James Daniel Good Real Property*¹⁵¹ that the Due Process Clause of the Fifth Amendment requires notice and an opportunity to be heard prior to seizure should protect real property owners from being deprived of the rights inherent in real property ownership.

Although the war on drugs involves important national interests and should be fought with unbridled determination, courts should recognize that protection of innocent persons from arbitrary governmental encroachment constitutes a hallmark of American jurisprudence. For this reason, acknowledgement of these defenses would be a paramount first step towards ensuring that the Constitution is not overlooked at this important juncture in the drug war.

148. 113 S. Ct. 1126 (1993).

149. 113 S. Ct. 2801 (1993).

150. 463 U.S. 277 (1983).

151. 114 S. Ct. 492 (1993).